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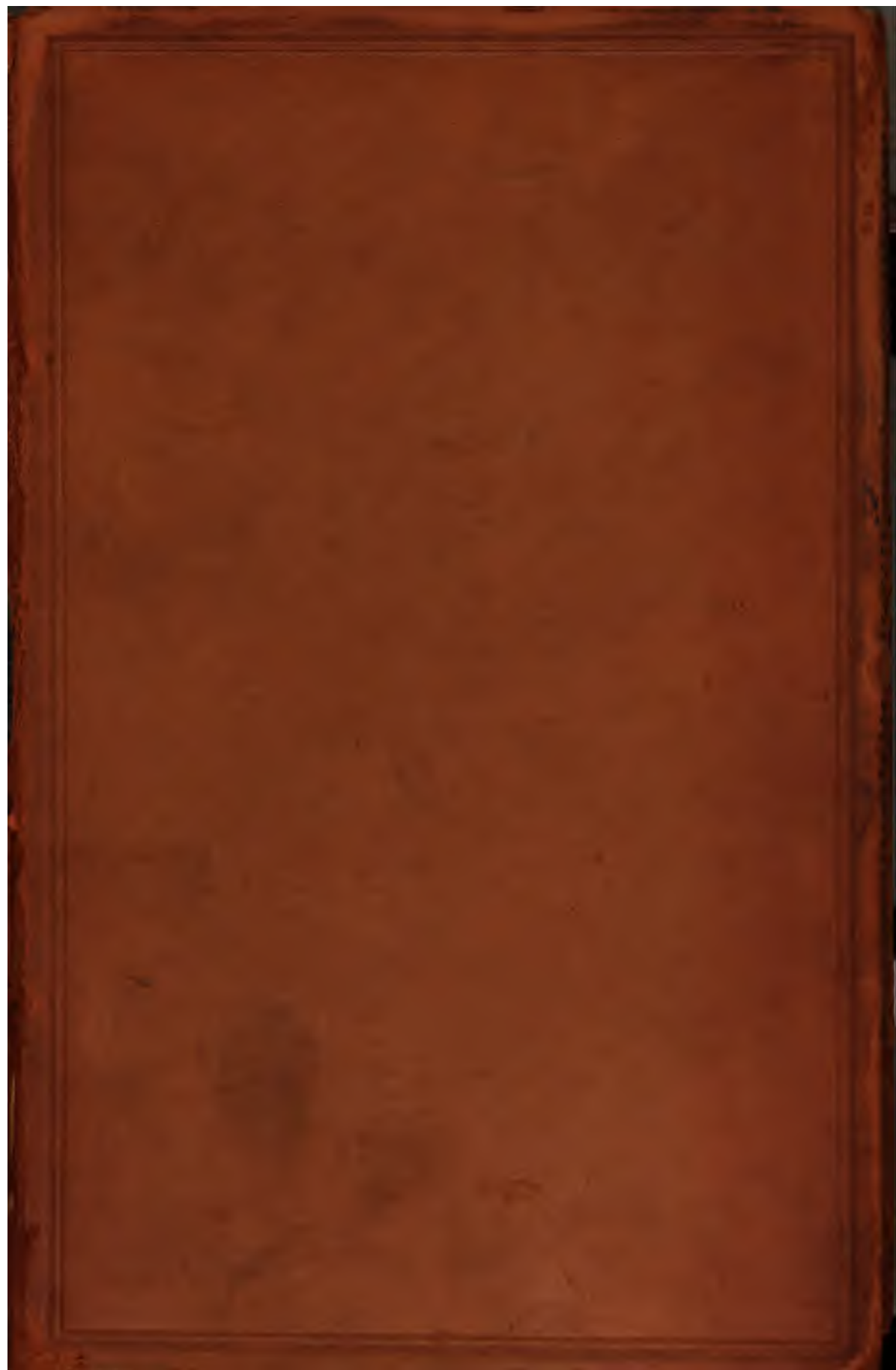
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DECISIONS

OF THE

FIRST COMPTROLLER

IN THE

DEPARTMENT OF THE TREASURY

OF THE

UNITED STATES.

By WILLIAM LAWRENCE,
FIRST COMPTROLLER.

VOL. V—1884.

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INTRODUCTION.

The EXECUTIVE GOVERNMENT OF THE UNITED STATES, in its relations to foreign nations, their citizens or subjects, to the States within and subject to the National jurisdiction, to citizens of the Republic, and to the Legislative and Judicial branches of the Government, derives its authority from, exercises its functions by virtue of, and governs or is governed by, *law, written and unwritten*. The *written law*, which recognizes, grants, regulates, or limits executive authority and the scope of its duties, requires interpretation and construction as fully as the similar law applicable to legislative or judicial power and duty. It is a necessary incident of the authority, by which executive power is exercised and executive duty performed, that such authority should, as to executive questions, generally be the exclusive judge in construing the laws authorizing its creation, existence, and modes of procedure; for, otherwise, it would not be a co-ordinate and independent branch of the Government, but would be liable to have its functions crippled, if not usurped and overthrown, by one or both of the other two co-ordinate branches invested with portions of sovereignty. The power of the Executive branch of the Government to judge of and construe the written laws, which relate thereto, is as essential to its existence and independence, as is a similar power of the Judiciary or of Congress, respectively, in relation to its jurisdiction and duties. When power is given to an executive officer to act, he must, of necessity and as an incident thereof, have authority to judge and decide on all executive questions relating to his action, because of the rule that "whenever a power is given * * * everything necessary to the making of it effectual is given by implication." (2 Inst., 306; 12 Rep., 130; Potter's Dwaris, Statutes, 123.) And when executive authority is given to be exercised in a prescribed mode, its actions and determinations, on executive questions affecting the rights of parties, are conclusive, exclusive, and generally subject to no review. (Exigency Case, 3 Lawrence Compt. Dec., 97; *Id.*, Introduction, XXVII-XLI; *State v. Marlow*, 15 Ohio, St., 134.) If this be not so, then the exercise of executive authority is practically nugatory and without purpose or effect. And, by a well-settled principle, effect is to be given to the lawful exercise of authority so as to make it effectual, rather than to permit it to fail of its object.

The Executive branch of the Government, in executing whatever power it can itself fully exercise without invading the functions of any other branch of sovereignty, does not require either the consent or construction of any authority but its own. The same principles must necessarily apply in ascertaining and giving effect to the unwritten law authorizing and controlling the Executive Government. Power given by unwritten law is as effective as that given by written law. There are of course many questions which in their character are *judicial*, and the determination of these by the Judiciary is conclusive on the other branches of the Government. Recognizing this to the fullest extent, and with the highest sense of loyalty to the Judiciary, it is not saying too much to affirm that THE LAW OF THE EXECUTIVE GOVERNMENT embraces a range of subjects as wide in extent, as great in variety, as complex in character, involving as many public and private interests as profoundly important in their relations to the perpetuity of Republican institutions, the advance of civilization, and the well-being of mankind, as any system of law which can exist. It may also be said with propriety that, in a small degree, it has been the mission of this series of volumes of the DECISIONS OF THE FIRST COMPTROLLER, to give construction to some portions of the written LAW OF THE EXECUTIVE GOVERNMENT, and to present in a limited measure some principles of the International, inter-State, and National Executive, common law. The labors of the present First Comptroller in this direction will terminate with the volume now given to the public, and, with a few cases, perhaps, in the volume which will follow after this. The work, of preparing the volumes thus far, has been somewhat embarrassing, because unaided by any similar publication. In one sense, it has been a *pioneer* work. But it has been rendered somewhat pleasant, by the indulgent favor of many who are eminent in the legal profession, and by a taste to which, it may with propriety be said, the investigation of legal subjects is congenial in a degree far greater than can be evidenced or measured by any results accomplished.

It is hoped and believed that the work, so imperfectly begun, will continue with increased public favor and largely increased value in the learned and able hands to which it will doubtless be entrusted. Those who continue the work will be *honored* by the disapproval and hostility of some whose frauds will be exposed and defeated and whose illegal demands will thereby fail of their purposes, and of others whose errors of law and fact will be revealed and corrected, and who will regard such work as an unwelcome *intrusion*, and of still others, well-meaning men, confident in asserting what they honestly regard as their rights, but who cannot tolerate any judgment, however honest and correct, if at variance with their own—*Parrum parva decent*.

Some suggestions will now be made, in the hope that they may reach Congress, which would be out of place under other circumstances.

In order to secure entire uniformity in the construction given to statutes by accounting officers, and in the principles of National Execu-

tive common law by them announced, the jurisdiction of the First Comptroller should be extended to include the final decision of every question of law which may arise in the system of accounting; or, if the First Comptroller, under the name of Comptroller General, the Second Comptroller, and the Commissioner of Customs, the latter under the name of the Third Comptroller, should be organized into a *quasi* judicial tribunal, with an appropriate title, and with the jurisdiction above mentioned, this, it is believed, would be an improvement on the present system.

The public interests would be promoted, if Congress should make the official tenure and salary of the First Comptroller the same as that of the Justices of the Supreme Court of the United States; and, if the policy is to continue of allowing judges of the courts of the United States to retire on salary after a prescribed age and period of service (Rev. Stat., 714), for like reasons the same privilege should be accorded to First Comptrollers, whose duties are to a large extent substantially judicial in character. The other Comptrollers should be put on the footing of the Justices of the Supreme Court.

Grateful acknowledgments are tendered to the five successive Secretaries of the Treasury*—eminent, distinguished and deserving of high honors—for the confidence reposed in, and for the marked consideration shown to, the First Comptroller, by them, respectively, during the period of the preparation of the five volumes of the Comptroller's Decisions.

This volume is now submitted to the liberal and enlightened portion of the officials and public, for whose use it is designed.

WILLIAM LAWRENCE,

First Comptroller.

TREASURY DEPARTMENT,

First Comptroller's Office, December 31, 1884.

* *The Hons. John Sherman, William Windom, Charles J. Folger, Walter Q. Gresham, and Hugh McCulloch.*

DECISIONS

OF

THE FIRST COMPTROLLER (WILLIAM LAWRENCE) IN THE DEPARTMENT OF THE TREASURY OF THE UNITED STATES.

1884.

IN THE MATTER OF THE AUTHORITY OF THE HOUSE OF REPRESENTATIVES OF ONE CONGRESS BY RESOLUTION TO CONTINUE THE EMPLOYMENT OF PERSONS AFTER SUCH CONGRESS HAS EXPIRED.—HOUSE-RESOLUTION CASE.

The House of Representatives of the Forty-seventh Congress, by resolution of March 3, 1883, directed its Doorkeeper "to retain upon the laborers' roll until otherwise ordered" the names of T. and G. The House of the Forty-eighth Congress, by resolution of December 20, 1883, directed its Clerk to pay to each of them \$60 per month, out of the miscellaneous items of the contingent fund, for services rendered from March 4, 1883, to December 3, 1883. *Held:*

1. That the powers of the House of Representatives of the Forty-seventh Congress, ceased at noon of March 4, 1883, after which the resolution of March 3, 1883, was inoperative, and, hence, only gave employment and right to compensation to and including March 4, 1883.
2. That the House of Representatives has authority to dispose of its contingent fund in its own discretion, except so far as it is limited by act of Congress.
3. That section 3680 of the Revised Statutes limits the use of the contingent fund of each House of Congress, so that no payment can be made therefrom "to any clerk, messenger, or other attendant of * * * either of them, unless * * * employed by a resolution of one of the Houses," the effect of which is to allow compensation only *after* a valid employment by resolution.
4. That as the resolution of March 3, 1883, gave no authority for employment after March 4, 1883, the resolution of December 20, 1883, cannot authorize payment for any services after March 4, 1883, and prior to its passage.

March 3, 1883, the House of Representatives resolved that its Doorkeeper be, and is, "directed to retain upon the laborers' roll until otherwise ordered the name of Alexander B. Thomas and [Wilson Grice] now in charge of the cloak-room, at the rate of \$60 per month."

December 20, 1883, the House *resolved:*

"That the Clerk of the House pay out of the miscellaneous items of the contingent fund to Alexander B. Thomas and Wilson Grice \$60 a month each for services rendered from March 4, 1883, to December 3, 1883, as per resolution of the House passed March 3, 1883."

January 4, 1884, Hon. *James E. O'Hara*, a Representative in Congress from North Carolina, by letter to the First Comptroller asked his opinion—whether “the Clerk of the House is by law authorized to pay the said parties out of said contingent fund?”

OPINION BY WILLIAM LAWRENCE, *First Comptroller.*

The Clerk of the House of Representatives is the disbursing officer for the contingent expenses of that body (Rev. Stat., 53, 58, 59). The First Comptroller is required to settle the disbursing accounts of said clerk, and thus to pass on the legality of payments made by him (Rev. Stat., 269, 277; *Sister Elizabeth's case*, 2 Lawrence, Compt. Dec., 2d ed., 120). By reason of this, a proper usage has grown up of asking the opinion of the First Comptroller in cases of doubt before making payments.

The resolution of March 3, 1883, was passed by the House of Representatives of the Forty-seventh Congress, the powers of which ceased at noon of March 4, 1883, (President Fillmore's Proclamation, February 25, 1853—11 Stat., 788; *Ordway's case*, 4 Lawrence, Compt. Dec., 529). Hence the resolution only authorized the retention upon the laborers' roll, and the payment of the claimants, to and including March 4, 1883.

The House could not give authority to pay any person or employé indefinitely or beyond that time. The public money can only be paid out “in consequence of appropriations made by law (Const. U. S., Art. I, sec. 9, par. 7). A resolution of the House is not a law, and cannot appropriate money. It cannot authorize the payment of money unless in pursuance of some appropriation act or other statute. The act of August 5, 1882 (22 Stat., 221), made an appropriation from which the claimants can be paid to and including March 4, 1883. It is expressly limited to “the service of the fiscal year ending June thirtieth, eighteen hundred and eighty-three.” That act could have continued the employment and compensation of the claimants, but it did not. It did continue the employment and right to compensation of some clerks and employés of the respective Houses of Congress; and this was in some cases continued by the act of March 3, 1883 (22 Stat., 532), especially “for compensation of the officers, clerks, messengers, and others receiving an annual salary in the service of the” respective Houses. There is a large number of such officers with annual salaries prescribed by appropriation acts. The resolution of December 20, 1883, directs the Clerk of the House to pay the claimants “out of the miscellaneous items (act March 3, 1883—22 Stat., 536) of the contingent fund” of the House. The right and power of the House to dispose of its contingent fund in its own discretion are undoubted, *except* as they are limited by act of Congress. Section 3680 of the Revised Statutes declares that—

“No part of the appropriations which may be at any time made for the contingent expenses of either House of Congress shall be applied

as extra allowance to any clerk, messenger, or attendant of the two Houses, or either of them, or *as payment or compensation to any clerk, messenger, or other attendant of the two Houses, or either of them, unless such clerk, messenger, or other attendant be so employed by a resolution of one of the Houses*; or to any other than the ordinary expenditures of the Senate and House of Representatives."

After the 4th of March, 1883, neither of the claimants was, within the meaning of this section, "employed by a resolution of one of the Houses." There was not, and could not be, under the resolution of March 3, 1883, any valid employment after March 4, 1883. The resolution of December 20, 1883, did not authorize any employment. It could not authorize payment to the claimants for any services prior to its date, because section 3680 of the Revised Statutes prohibits payment, except to persons *after* a valid employment in pursuance of a resolution.

There are various provisions restricting and regulating the use of contingent funds (Rev. Stat. 56, 60, 76, 130, 3680; Act March 3, 1879—20 Stat., 419.) The act of August 5, 1882 (22 Stat. 255, sec. 4), provides that—

"After the first day of October next * * * all laws and parts of laws authorizing the employment of officers, clerks, draughtsmen, copyists, messengers, assistant messengers, mechanics, watchmen, laborers or other employes at a different rate of pay or in excess of the numbers authorized by appropriations made by Congress, be, and they are hereby repealed."

This, of course, does not limit the authority of each House of Congress to use its contingent fund in its discretion. But this and other provisions may aid in ascertaining the policy of Congress as to the use of contingent funds, and the proper construction of section 3680 of the Revised Statutes. There may be, perhaps, a power inherent in each House, to use its own contingent fund *in its own discretion for its own purposes*, which power, under the Constitution, no statute passed by one Congress can regulate or limit for a subsequent Congress. But section 3680 of the Revised Statutes can limit the authority of the present House as to the use of its contingent fund in paying expenses not incurred by its authority or for its own purposes.

There is no authority for the payment of the claimants, and the inquiry made of the Comptroller will be answered accordingly.

TREASURY DEPARTMENT,

First Comptroller's Office, January 5, 1884.

IN THE MATTER OF THE AUTHORITY OF THE HOUSE OF REPRESENTATIVES OF ONE CONGRESS TO REMOVE A PERSON HOLDING HIS APPOINTMENT UNDER A STATUTE ENACTED BY OR UNDER COLOR OF A RESOLUTION OF THE HOUSE OF A PRIOR CONGRESS—HOUSE APPOINTEE'S CASE.

1. The rule of the House of Representatives, authorizing its Doorkeeper to "appoint all of the employés of his department provided for by law," is warranted by the Constitution.
2. The expression in this rule—"provided for by law"—includes not only a *statute* providing for the appointment of officers and employés, but also a resolution of the House authorizing an appointment without designating a person as appointed thereby.
3. The rule does not authorize the Doorkeeper to appoint or remove a person named in, and appointed by, a resolution of the House.
4. A resolution of the House making such appointment to office, or authorizing one, has no force after the expiration of the Congress at which the resolution was passed.
5. An act of Congress may continue the existence of such office or employment for either House of Congress, and may provide for the payment of the officer or employé so appointed, even after the Congress during which he was appointed has expired.
6. But the House of Representatives of a subsequent Congress may remove any officer or employé so continued, and appoint another in his stead, or, by rule, authorize any proper officer of the House to do so.
7. The Constitution gives to the House of Representatives the power to "choose their Speaker and other Officers": This power of a present House cannot be abridged by the action of the House of, or even by a statute enacted by, a prior Congress.

December 19, 1881, the House of Representatives, at the first session of the Forty-seventh Congress, passed the following resolution:

"Resolved, That Joel Grayson be paid out of the contingent fund of the House the sum of \$3.60 per day for services as assistant document file clerk under the Doorkeeper of the House, from and including the fifth day of December, 1881, and until otherwise ordered by the House."

Grayson performed the duties of the position mentioned in the resolution. The deficiency appropriation-act of August 5, 1882 (22 Stat., 271), makes an appropriation as follows:

"To pay Joel Grayson balance due him for services as assistant file clerk from the fifth to the nineteenth of December, eighteen hundred and eighty-one, inclusive, at the rate of three dollars and sixty cents per diem, fifty dollars and forty cents."

"The legislative, executive, and judicial" appropriation-act of March 3, 1883 (22 Stat., 531, 535), "for the service of the fiscal year ending June thirtieth, eighteen hundred and eighty-four," makes an appropriation to pay the "assistant document file clerk, under resolution of December nineteenth, eighteen hundred and eighty-one, one thousand three hundred and fourteen dollars."

Under this provision Grayson has received monthly compensation since June 30, 1883, up to December 17, 1883.

December 17, 1883, the Clerk of the House was notified by James G. Wintersmith, Doorkeeper of the House of Representatives of the Forty-eighth Congress, that he had, on that day, removed Mr. Grayson from the position of assistant document file clerk, and appointed in his place Allen T. Davidson.

January 7, 1884, Hon. John B. Clark, jr., Clerk of the House, addressed a letter to the First Comptroller, saying that the question has arisen as to the Clerk's authority, as disbursing officer of the House, to pay said Davidson for services as assistant document file-clerk *before the expiration of the fiscal year*, for which appropriation was made by said act of March 3, 1883 (22 Stat., 535); and the Clerk submits the question for consideration and decision.

DECISION BY WILLIAM LAWRENCE, *First Comptroller*.

The Constitution (Art. I, sec. 2, par. 5) declares that :

"The House of Representatives shall chuse their Speaker and other Officers."

This is simply *declaratory* of an authority inherent in every legislative body, as a necessary incident of its powers, and essential to their proper execution (1 Story, Const., 4th ed., § 687). *Quando lex aliquid concedit, concedere videtur et id, per quod devenitur ad illud* (Potter's Dwarria, Stats. 123). Long usage has determined that the House may authorize its principal officers to appoint subordinates. Thus, a rule of the House provides that :

"There shall be elected by a *viva voce* vote at the commencement of each Congress, to continue in office until their successors are chosen and qualified, a Clerk, Sergeant-at-Arms, Doorkeeper, Postmaster, and Chaplain, each of whom shall take an oath to support the Constitution of the United States, and for the true and faithful discharge of the duties of his office, to the best of his knowledge and ability, and to keep the secrets of the House, and each shall appoint all of the employés of his department provided for by law."

This rule has been adopted by, and is in force in, the House of this Forty-eighth Congress.

It is well settled that, when authority is granted to a designated officer to appoint any person in his discretion to an office, and the *law* does not give the incumbent a right to hold the same for any specified period, the power of removal and of filling the vacancy thereby made is incidental to the authority to appoint (2 Story, Const., 4th ed., § 1537). The rule of the House above quoted gives to the Doorkeeper authority to "appoint all of the employés of his department provided for by *law*." This includes all employés authorized by statute or provided for by resolution of the House, and not designated by name. The power, to appoint or remove an employé, does not extend to an officer

appointed *by name* by resolution of the House during the period of the Congress passing such resolution. But when the Congress has expired, the resolution ceases to have prospective force. When such officer or employé is continued in his position thereafter, as is this case, by a statute, he is, within the meaning of the rule of the House, an employé "provided for by law."

The Revised Statutes (sec. 53) have created certain officers of the House. But each House has power to appoint *other* officers of its own creation, and to remove, and even to refuse to employ, those provided for by a statute of a previous Congress. The right to create appropriate offices, and to appoint officers, is given *by the Constitution*, and cannot be taken away by a statute not assented to by the Congress affected thereby. A right or power given by the Constitution cannot be taken away by a statute. The resolution of December 19, 1881, creating the office of "assistant document file-clerk," by its *own force* continued such office *during the existence of the Forty-seventh Congress*—up to noon of March 4, 1883. "The legislative, executive, and judicial" appropriation-act of March 3, 1883 (22 Stat. 531, 535), continued the same office *through the fiscal year from June 30, 1883, to July 1, 1884*, and provided for payment of compensation *during that period*. The question, which now arises, is, whether *this act continued Joel Grayson in office during this fiscal year*, so that neither the Doorkeeper nor the House of the present Congress can remove him. If it be assumed that this act has the same force as if it specifically *named* Joel Grayson as *the* assistant document file-clerk, and that it was so intended, still it cannot be operative to impose on the present House of the Forty-eighth Congress a person as one of its officers against its own choice or against the choice of its Doorkeeper authorized to decide for it. The House of the Forty-seventh Congress could, as it did, appoint Grayson. The resolution appointing him was warranted by that provision of the Constitution which gives to the House the power to "choose their Speaker and other Officers." The rule of the House does not give the Doorkeeper power to remove any person appointed by resolution of the House to an office created by such resolution during the existence of the Congress which passed it.

But the House of the Forty-seventh, had no power to provide a Speaker or any other officer for the House of the Forty-eighth, Congress, because the Constitution gives to the House of each Congress the sole, uncontrolled, and independent power to choose and remove all its own officers at pleasure. Even a statute enacted by the Forty-seventh Congress could not take from the House of the Forty-eighth Congress its power to choose all its own officers. Such statute would be void. This appears so clearly by the words of the Constitution that no argument seems necessary to prove it. Neither the House of the Forty-seventh Congress, nor even a statute, could continue Grayson in office during any part of the Forty-eighth Congress against the choice or direction of the

Removal of Employés of Prior Congress.—House-Appointee's Case. 7

House of the latter Congress. If this could be done, a Speaker could equally, by the same forms, be imposed on the present House. The attempt to do so would be absurd. It is to be presumed that Congress did not intend to violate the Constitution; and "the legislative, executive, and judicial" appropriation-act of March 3, 1833 (22 Stat., 531, 535), is, therefore, to be so construed as to make it conform to the Constitution. Its reasonable construction is, that it continued the office of "assistant document file clerk" during the fiscal year ending June 30, 1884; that it gave to Joel Grayson, as the incumbent thereof, the right to payment for services during such year, until a successor should be appointed under the authority of the House of the Forty-eighth Congress; and that the rule of the House gave to the Doorkeeper the power of removal and authority to appoint a successor in such office. The right of Grayson to compensation ceased with his removal, December 17, 1883, and the right of Davidson as Grayson's successor then commenced.

The Clerk of the House will be advised accordingly.

TREASURY DEPARTMENT,

First Comptroller's Office, January 11, 1884.

IN THE MATTER OF THE APPROPRIATIONS MADE BY CONGRESS FOR
THE CONSTRUCTION OF THE BOUNDARY STREET AUXILIARY SEWER
IN THE DISTRICT OF COLUMBIA.—SEWER-APPROPRIATION CASE.

1. The appropriations made by the acts of March 3, 1879 (20 Stat., 403), June 4, 1880 (21 Stat., 155), March 3, 1881 (*Id.*, 458), July 1, 1882 (22 Stat., 135), and March 3, 1883 (*Id.*, 464), for the construction of the boundary street auxiliary sewer in the District of Columbia, are "*annual*," and not "*permanent specific*" appropriations.
2. If the words of an appropriation-act are such as to admit of doubt whether the appropriation is "*annual*" or "*permanent specific*," it is to be deemed the former.

January 5, 1884, the Commissioners of the District of Columbia addressed a letter to the First Comptroller, as follows:

"The Commissioners have the honor to submit the following questions suggested by the Auditor, D. C.:

"First: Whether any and all balances of appropriations for the construction of Boundary street sewer, heretofore made (if such balances are still remaining) are available for the payment of *expenses properly incurred* in its construction, under any existing contract, *legally* entered into, and upon which payments are still due?

"Second: Whether the balances of appropriations for the construction of said sewer, which may remain at the close of any fiscal year, are not embraced within the class specially exempted from being carried to the surplus fund after the expiration of two fiscal years, under the proviso contained in sec. 5, 18 Stat., p. 110 [act of June 20, 1874], which is in the following words, to wit: *Provided*, That this provis-

ion shall not apply to permanent specific appropriations [etc., etc.] * * * ; but the appropriations named in this proviso shall continue available until otherwise ordered by Congress?

"The Boundary street sewer must necessarily be considered in its entirety, and as one work, not available for the purposes for which it is being constructed until finally completed. Appropriations have been made from year to year for the prosecution of this particular work, and may be fairly considered as continuous appropriations on account of the construction of said sewer."

OPINION BY WILLIAM LAWRENCE, *First Comptroller*.

The questions submitted may practically be resolved into one: Are the appropriations made for "work on Boundary street auxiliary sewer" "annual" or "permanent specific," appropriations?

The appropriations made by Congress to be expended by the Commissioners of the District of Columbia are generally made on estimates, which the law requires to be prepared and submitted to Congress by the Commissioners (act June 11, 1878—20 Stat., 103, 104, sec. 3). An examination of the estimates and appropriations relating to the sewer in question will show their purpose and effect.

The estimates are usually made under captions similar to the following:

"Estimates of appropriations required for the service of the government of the District of Columbia for the fiscal year ending June 30, 1879."

The estimates for the fiscal year ending June 30, 1879, included one, as follows:

"Boundary street auxiliary sewer, \$100,000.00."

The act of March 3, 1879 (20 Stat., 416, 417), appropriated money in a gross sum for the expenses of the District, and provided that:

"All said appropriations shall be expended in accordance with the estimates of the Commissioners of said District, approved by the Secretary of the Treasury."

Other estimates and appropriations were made as follow:

Estimate for the fiscal year ending June 30, 1880:

"Boundary auxiliary sewers, \$100,000.00."

The act of March 3, 1879 (20 Stat., 403), appropriated for "work on Boundary street auxiliary sewer, one hundred thousand dollars."

Estimate for the fiscal year ending June 30, 1881:

"Boundary street auxiliary sewer, \$100,000.00."

The act of June 4, 1880 (21 Stat., 155), appropriated "for Boundary street auxiliary sewer, one hundred thousand dollars."

Estimate for the fiscal year ending June 30, 1882:

"Boundary street auxiliary sewer, \$100,000.00."

The act of March 3, 1881 (21 Stat., 458), appropriated "for Boundary street auxiliary sewer, fifty thousand dollars."

Estimate for the fiscal year ending June 30, 1883 :

“Boundary street intercepting sewer, \$85,000.00.”

The act of July 1, 1882 (22 Stat., 135), appropriated “for Boundary street intercepting-sewer, eighty-five thousand dollars.”

Estimate for the fiscal year ending June 30, 1884 :

“Boundary intercepting sewers, \$75,000.00.”

The act of March 3, 1883 (22 Stat., 464), appropriated “for Boundary intercepting sewers, seventy-five thousand dollars.”

The title of the act of June 4, 1880 (21 Stat., 155), is as follows :

“An act making appropriations to provide for the expenses of the government of the District of Columbia *for the fiscal year ending June thirtieth, eighteen hundred and eighty-one*, and for other purposes.”

This act provides :

“That the half of the following sums named, respectively, is hereby appropriated out of any money in the Treasury not otherwise appropriated, and the other half out of the revenues of the District of Columbia, for the purposes following, being the estimated expenses of the government of the District of Columbia for the fiscal year ending June thirtieth, eighteen hundred and eighty-one, namely:” &c.

A title and a provision in similar form are found in the acts of March 3, 1881 (21 Stat., 458), July 1, 1882 (22 Stat., 135), and March 3, 1883 (*Id.*, 462). The Revised Statutes provide :

“SEC. 11. The style and title of all acts making appropriations for the support of Government shall be as follows: ‘An act making appropriations [here insert the object] for the year ending June thirtieth [here insert the calendar year].’”

There are abundant reasons for holding that the several appropriations made for the sewer mentioned are *annual*, and, of course, as a consequence, not permanent specific.

1. The estimates, on which the first appropriation was made, asked for appropriations “*for the service of the government of the District of Columbia for the fiscal year ending June 30, 1879*,” and the first appropriation-act of March 3, 1879 (20 Stat., 417), declared, as to the appropriations therein made, that “all said appropriations shall be *expended in accordance with the estimates*.” The subsequent estimates and appropriations are similar in form. The purpose and effect of estimates have been elsewhere considered (1 Lawrence, Compt., Dec., 2d ed., App., ch. xiv, 581; Artificial-Limbs’ case, 2 Lawrence, Compt. Dec., 2d ed., 384). The clear *terms* and *purpose* of the estimates and acts mentioned make the money appropriated applicable to the service of the designated fiscal year. A construction which would convert these annual appropriations into permanent specific appropriations, finds no sanction in the language employed.

It was well said in *Rex v. Burrell* (12 Ad. and E., 468), by Patteson, J., “I see the necessity of not importing into statutes words which are not to be found there.” And this declaration has been sanctioned by the Supreme Court of the United States (*Leavenworth, etc., R. R. Co. v.*

United States, 92 U. S., 751). It would require "words which are not to be found there" to be imported into the appropriation acts mentioned, to convert the annual appropriations therein respectively made expressly *for the service of a designated fiscal year* into appropriations, not alone for such years respectively, but extending indefinitely through any period of time in the discretion of the Commissioners of the District of Columbia.

2. The conclusion stated is required by a rule of construction applicable to appropriation acts, and founded on public policy, and on respect for the authority of Congress. This rule is, that, if the words of an appropriation act are such as to admit of doubt whether the appropriation is "*annual*" or "*permanent specific*" it is to be deemed the former. Appropriations, which in terms are *annual*, are generally made in view of a *necessity* existing, or which may be supposed to arise within a specified year. The *expediency* of making them is founded on existing or probable values of labor and materials during such year. The *necessity* may not exist in the distant future, and long delay may also bring greatly increased values and cost.

Congress may willingly appropriate money to be expended in a specified year for a work, in view of existing necessity and present values, when it would not make such appropriation to be expended in the indefinite and distant future with its changed necessities and values. It is not to be supposed that one Congress will make appropriations for the distant future with no present necessity for such action, when a later Congress could, with better means of judging, decide on the subsequent necessity and expediency of making such appropriations. A permanent specific appropriation places the money thereby appropriated *indefinitely* under the control of officers authorized to expend it, and permanently beyond the control of Congress, except by operation of a repealing act not always attainable. It organizes an interest to resist the will of Congress in attempting a repeal; and, when a contract, indefinite in its time of execution, is once made under such an appropriation, rights become fixed, and, practically, Congress is powerless to effect a repeal. It should require clear language in an act to secure for it this force and effect. The construction of an appropriation act is to be made, not alone upon its own language, but in view of other controlling statutes and the policy thereby established. Congress has, by repeated acts, limited and controlled the use of appropriations. The policy and effect of this legislation have been elsewhere considered, and it is unnecessary to repeat what has thus been said. (House Ex. Docs., No. 27, 45th Congress, 2d sess.; 1 Lawrence, Compt. Dec., 2d ed., App., Ch. XIV, 579, 587; Coyle's case, 4 Lawrence, Compt. Dec., 517.)

3. Congress has given a practical construction to appropriation-acts similar to those for the sewer now in question (Mississippi Central Railroad Company's case, 4 Lawrence, Compt. Dec., 553). Thus, there have been many annual appropriation-acts appropriating money for the

as extra allowance to any clerk, messenger, or attendant of the two Houses, or either of them, or *as payment or compensation to any clerk, messenger, or other attendant of the two Houses, or either of them, unless such clerk, messenger, or other attendant be so employed by a resolution of one of the Houses*; or to any other than the ordinary expenditures of the Senate and House of Representatives.”

After the 4th of March, 1883, neither of the claimants was, within the meaning of this section, “employed by a resolution of one of the Houses.” There was not, and could not be, under the resolution of March 3, 1883, any valid employment after March 4, 1883. The resolution of December 20, 1883, did not authorize any employment. It could not authorize payment to the claimants for any services prior to its date, because section 3680 of the Revised Statutes prohibits payment, except to persons *after* a valid employment in pursuance of a resolution.

There are various provisions restricting and regulating the use of contingent funds (Rev. Stat. 56, 60, 76, 130, 3680; Act March 3, 1879—20 Stat., 419.) The act of August 5, 1882 (22 Stat. 255, sec. 4), provides that—

“After the first day of October next * * * all laws and parts of laws authorizing the employment of officers, clerks, draughtsmen, copyists, messengers, assistant messengers, mechanics, watchmen, laborers or other employes at a different rate of pay or in excess of the numbers authorized by appropriations made by Congress, be, and they are hereby repealed.”

This, of course, does not limit the authority of each House of Congress to use its contingent fund in its discretion. But this and other provisions may aid in ascertaining the policy of Congress as to the use of contingent funds, and the proper construction of section 3680 of the Revised Statutes. There may be, perhaps, a power inherent in each House, to use its own contingent fund *in its own discretion for its own purposes*, which power, under the Constitution, no statute passed by one Congress can regulate or limit for a subsequent Congress. But section 3680 of the Revised Statutes can limit the authority of the present House as to the use of its contingent fund in paying expenses not incurred by its authority or for its own purposes.

There is no authority for the payment of the claimants, and the inquiry made of the Comptroller will be answered accordingly.

TREASURY DEPARTMENT,

First Comptroller's Office, January 5, 1884.

ing piers and abutments, three thousand dollars; repairs of Rock Creek bridges, one thousand dollars; in all ten thousand two hundred dollars.

And one of the two railroad tracks now on said Anacostia bridge shall be at once removed.

For maintaining institutions of charity, reformatories, and prisons as follows:" &c.

If the sewer appropriations are to be construed as "permanent specific," why shall not all the others above specified be also so construed? What appropriations will be annual? In practice, all these appropriations have been deemed annual. There is not the slightest ground to justify any other construction. The conclusion is inevitable, that the "appropriations for the construction of Boundary street sewer" are annual, and not permanent specific in character.

The questions of the honorable Commissioners are answered as follows:

Section 3690 of the Revised Statutes limits the use of appropriations made for the service of any fiscal year "to the payment of expenses properly incurred during that year, or to the fulfillment of contracts properly made *within that year*." Hence no contract can be made *after* the expiration of such year for the expenditure of such appropriation, and money appropriated for any one fiscal year cannot be expended in paying liabilities accrued under a contract made in pursuance of an appropriation for a prior or subsequent fiscal year, as such contract can only authorize the expenditure of the appropriation for the service of the prior or subsequent year. This necessarily follows from general principles, of which section 3733 of the Revised Statutes is declaratory in providing that "no contract shall be entered into for * * * any public improvement which shall bind the Government to pay a larger sum of money [for any one year] than the amount * * * appropriated for the specific purpose." The same may be said of section 3732, declaring that "no contract * * * shall be made unless the same * * * is under an appropriation adequate to its fulfillment."

And section 3733 is aided in the cases to which it applies, by the penalties prescribed in section 5503. The purpose of these sections is further aided by that clause of section 3690, which declares that balances of appropriations not required for "the fulfillment of contracts properly made within" the fiscal year of any appropriation "shall be carried to the surplus fund," within, as provided by act of June 20, 1874 (18 Stat., 110, sec. 5), "two fiscal years" thereafter. And, for the purpose of enforcing this policy, the act of June 14, 1878 (20 Stat., 130, sec. 4), repeals "so much of section 5 of the act approved June twentieth, eighteen hundred and seventy-four, [18 Stat., 110], as directs the Secretary of the Treasury at the beginning of each session to report to Congress, with his annual estimates, any balances of appropriations for specific objects affected by said section that may need to be reappropriated." It is equally clear that the balance of an appropriation made for any fiscal year, and not required for "the payment of expenses properly incurred during that

year, or * * * [for] the fulfillment of contracts properly made within that year," "shall be carried to the surplus fund" (Rev. Stat., 3690).

The Commissioners of the District of Columbia will be advised accordingly.

TREASURY DEPARTMENT,

First Comptroller's Office, January 14, 1884.

IN THE MATTER OF THE RIGHT OF EXPORTERS OF GOODS, ON WHICH INTERNAL-REVENUE TAXES WERE PAID, TO THE DRAWBACK AUTHORIZED BY SECTION 171 OF THE ACT OF JUNE 30, 1864 (13 STAT., 302), WITHOUT COMPLIANCE IN ALL RESPECTS WITH THE TREASURY DEPARTMENT REGULATIONS ON THE SUBJECT.—EXPORTERS' CASE.

1. The allowance by the Commissioner of Internal Revenue of a claim for drawback under section 171 of the act of June 30, 1864 (13 Stat., 302), is not conclusive on the accounting officers.
2. The general rule is, that the proper Auditor is, for all purposes of executive administration, made a judge, in the first instance, of the facts on which any claim against the United States is to be allowed or rejected; and after him the proper Comptroller is made the sole, exclusive, and final judge of the law and facts.
3. *Exceptions* to this *general rule* can only exist by force of language in a statute, which *clearly* shows their existence.
4. *Exceptions* to the general rule do exist, as to the findings of facts, in two classes of cases, viz: (1) When the right of a claimant is (a) fixed by statute, which (b) confers upon some designated officer the power to decide finally and authoritatively on the existence of the facts, which give a right to payment; and (2) when some statute gives a designated officer or agent authority (a) to contract for supplies, work, or services, and (b) to make an allowance, or to determine the amount to be paid therefor, after such supplies are furnished, or such work or services are performed.
5. A claim for drawback under section 171 of the act of June 30, 1864 (13 Stat., 302), does not belong to either of the two excepted classes of cases above mentioned, but does belong to a *third class*, in which (1) the claimant's right exists by law, (2) the *facts* necessary to support it *are specified by law or regulations*, or both, and (3) *some or all* of these facts are required to be established to the satisfaction of some designated officer (4) before such claim passes to the regular accounting officers for their independent and final executive action.
6. The approval or allowance of a claim against the United States may give a right of action in a court, when such approval or allowance will not be regarded by the accounting officers of the Treasury Department as evidence of a right to payment. The effect of such allowance, when involved in a judicial inquiry, is to be determined by the court; but its effect, when it arises before the accounting officers in the discharge of their duties, is to be decided by them.
7. When an officer is *imperatively* required to find any fact, before passing a claim to the proper accounting officers for their final action, the facts which give him jurisdiction must affirmatively appear, or his action will be deemed void. In such case he exercises a special, statutory, and limited jurisdiction.

8. A claimant for drawback does not lose his right to payment by the wrongful failure of an officer of the Government to furnish the evidence which he is, by law or regulations, required to furnish in support of a claim.
9. A drawback-payment, on proper evidence, arises as a right under the statute, exists upon a sufficient, valuable consideration, and is not a gratuity.
10. Statutes are *absolute* or *directory*. A party who asserts a claim under an *absolute statute*, must comply with its requirements. A party who asserts a claim under a *directory statute*, is not bound to comply with its requirements, if he furnishes sufficient evidence otherwise in support of his claim.
11. When a statute affirmatively prescribes or regulates the way in which something shall be done, with no negative expressed, such statute is generally, but not always, *directory*.
12. When a statute *directs* that evidence be furnished in given forms and within specified times, with no express or implied negative as to other forms or times, such statute is also merely *directory*.
13. On established legal principles, the "essence" of the evidence required of a claimant for drawback is sufficient legal proof that he has manufactured goods, has paid the internal-revenue tax thereon, and has exported the same. The regulations on the subject of evidence in support of these facts are *directory* as to its form and the time of furnishing it, and of performing the acts required as a means of supplying proofs.
14. If a claimant for drawback fraudulently disregards the regulations, he cannot ask the aid of accounting officers, to relieve him from the consequence of his own wrong, or to secure payment.

The act of June 30, 1864, (13 Stat., 302 sec. 171), provides :

"That * * * there shall be an allowance or drawback on all articles on which any internal duty or tax shall have been paid, * * * equal in amount to the duty or tax paid thereon, and no more, when exported, the evidence that any such duty or tax has been paid to be furnished to the satisfaction of the Commissioner of Internal Revenue by such person or persons as shall claim the allowance or drawback, and the amount to be ascertained under such regulations as shall * * * be prescribed by the Commissioner of Internal Revenue under the direction of the Secretary of the Treasury."

The act of July 13, 1866 (14 Stat., 153, sec. 20), provides for "an officer * * * to superintend all matters of exportation and drawback, under the direction of the" proper collector of internal revenue. The following, omitting the forms, is a summary of the material portion of the "regulations" prescribed under the act first above quoted :

"I. To entitle the exporter to the allowance or drawback provided for in the sections above quoted, he must, at least six hours previous to lading on board any vessel or other conveyance for exportation any of the articles intended to be exported by him, on which he shall desire to claim a drawback of internal revenue taxes, file with the collector of the customs for the district from which such exportation is to be made a notice in duplicate setting forth his intention to export the articles described therein, the place where deposited, the name of the vessel or other conveyance in or by which, and the port or place to which, the same are intended to be exported, which notice will be given in the following form, viz: Form A.

"II. On the receipt of this notice in duplicate, the collector or his deputy will issue an order for examination and shipment, in duplicate, and attach the same to the notice and forward the original and dupli-

cate papers to the surveyor, which order will be in the following form, viz: Form B. The notice for shipment and order for examination will be delivered, in duplicate, to the inspector detailed by the surveyor to attend to the shipment, and it shall be his duty to execute said order promptly.

"III. After the return of lading, and at any time within ten days after the clearing of the vessel having the merchandise on board, the exporter must file with the collector of customs an entry, in duplicate, of the merchandise described in the notice of shipment and return of lading, and an affidavit, in duplicate, of the exporter, according to Forms D and E.

"IV. When the foregoing forms shall have been executed, the collector of customs will transmit without delay to the superintendent of exports the original of each of said forms, together with his own certificate in duplicate, in the form following, viz: Form F.

"V. The exporter, or the party entitled to the drawback, shall *within sixty days after the clearing of the vessel or other conveyance on which the merchandise was laden*, file with the superintendent of exports a bill of lading for the merchandise named in the entry, and a certificate in duplicate from the collector of internal revenue to whom the tax was paid; and also an affidavit, in duplicate, from the manufacturer or producer of the merchandise on which the drawback is claimed, which certificate and affidavit will be in the following forms, viz: Forms G and H.

"VI. Within a reasonable time, varied according to the distance of the port of destination, and before the transmission by the superintendent of exports of the foregoing proofs for examination, the exporter, or the party entitled to the drawback, must file with said superintendent a landing certificate * * * in the following form, viz: Form P.

"VII. Upon receipt of the landing certificate by the superintendent of exports, he will, if the same is found to agree with the entry (Form D) and remaining proofs of shipment, issue a certificate of the amount of drawback due, and, retaining the landing certificate and the duplicates of Forms F, G, and H in his office, he will transmit a complete set of original proofs, except the landing certificate, to the Commissioner of Internal Revenue. Said certificate will be in the following form, viz: Form I.

"VIII. The evidence will be reviewed by the Commissioner of Internal Revenue, and if, on examination, he shall find the same satisfactory, he will award the amount due the claimant." (Davis's case, 17 Ct. Cl., 296.)

The firm of C. and G. C. Winchester engaged in manufacturing chairs at Ashburnham, Mass., made the requisite monthly returns of the value of its manufactures, and alleges that it paid \$51,357.50 internal-revenue tax thereon for the years 1864 to 1867, inclusive (act June 30, 1864—13 Stat., 260, sec. 86); under section 171 of this act (13 Stat., 302), the above-named firm has been paid sundry claims for drawback—over fifty—on chairs exported during that period.

March 30, 1868, the claimants filed with the Commissioner of Internal Revenue an application for payment of drawback on forty-one shipments of chairs from New York and Boston to foreign ports at various dates, from August, 1863, to February, 1868, which application states:

"That, in some instances, through inadvertence on the part of our shippers, the notice of shipment, as per Form A, was not given, and in some cases we have failed through similar causes to obtain landing certificates. * * * In 1863, and since, we exported chairs, and

have procured bills of lading and certificates of having paid taxes * * * and placed [them] * * * in the hands of * * * the superintendent of drawbacks in New York, but have not been able to learn anything further upon the subject; that the failure to comply with all the forms and regulations of the revenue department was occasioned in every case by accident, ignorance, and circumstances beyond [our] control, and without intention of evading the law or regulations."

This is verified by affidavit with an exhibit showing the several dates and places of shipment, number of chairs shipped, names of shippers, vessels, value of chairs shipped, and amount of internal-revenue tax paid on each lot shipped, but not the date of such payment.

Evidence was filed with the Commissioner of Internal Revenue as follows:

Affidavit, September 4, 1882, of one of the claimants, alleging payment of internal-revenue taxes, and exportation, as claimed; certificate, November 25, 1882, of a deputy collector of customs at New York, tending to show eight shipments as claimed, and as "appear on the outward manifests of the vessels named under the dates given;" certificate, same date, of collector of internal revenue of the second district of New York, that he has not been able to find any records in his office, which can be identified as applying to any of the last above-mentioned shipments; and affidavit, February 24, 1883, of one of the claimants, alleging payment of the internal-revenue taxes on all the exported goods.

The claims were examined in the office of the Commissioner of Internal Revenue, in which examination it was supposed to be ascertained that sundry of the claims were barred, and that others had already been allowed and paid, leaving only eight, in every one of which on the 26th of February, 1883, the Commissioner *certified* to the Fifth Auditor that the claimants "are entitled to an allowance or drawback" amounting to a sum specified, and aggregating in all, \$590.92. The usual printed blank form of the certificate in such cases states:

"That there has been filed in this office [of the Commissioner of Internal Revenue] *the evidence required by the regulations of the Secretary of the Treasury, on the subject of drawback*, showing that the internal-revenue taxes have been paid on the following drawback merchandise, viz [described]: and that the same were *duly* exported from the port of [named] and a bond executed with sufficient sureties, conditioned, that the same be [were] not relanded within the United States."

In the certificates of the Commissioner the words above in *italics* are *erased*, and, in lieu of the word, "*be*," in same, the word, "*were*," is inserted.* None of the evidence required by the first seven paragraphs

* The following is a copy of one of the certificates:

[Official.]

No. 22349.]
 2343³/₁₀.

TREASURY DEPARTMENT,
 OFFICE OF INTERNAL REVENUE, (C. A. B.,)
 Washington, February 26th, 1883.

This is to certify that there has been filed in this office [the]* evidence [required by the regulations of the Secretary of the Treasury on the subject of drawback].

* Words inclosed in brackets are erased in the original.

of the Regulations is furnished, except, in two of the claims, the evidence required by paragraph "vi," and, in one other, that required by paragraph "v."

June 4, 1883, the Fifth Auditor reported the claims to the First Comptroller, for his decision thereon.

DECISION BY WILLIAM LAWRENCE, *First Comptroller* :

Section 171 of the act of June 30, 1864 (13 Stat., 302), is not incorporated into the Revised Statutes, and so is repealed, other provisions of the act having been incorporated therein (Rev. Stat., 5595, 5596). The same may be said of section 20 of the act of July 13, 1866 (14 Stat., 153). The rights of the claimants are not affected by the repeal, but are saved therefrom by section 5597 of the Revised Statutes. Notwithstanding the repeal, the questions arising in the present case are important, as affecting similar cases under existing laws, and, for this reason, they will be briefly examined. Claims of the character of those now presented have been frequently considered.

In Davis's case (17 Ct. Cl., 292), the plaintiff brought suit to recover the amount of a drawback on machinery exported from the United States, on which an internal-revenue tax had been paid; and he based his claim upon section 171 of the act of June 30, 1864 (13 Stat., 302), section 20 of the act of July 13, 1866 (14 Stat., 153), the regulations made in pursuance of the former section, and the allowance of said amount by the Commissioner of Internal Revenue. The Court said (Davis's case, 17 Ct. Cl., 300), that:

"An adjudication against the Government, by an officer authorized by law to make it, establishes a liability on the part of the Government to pay, unless it be impeached for fraud or mistake." (Kaufman's case, 11 Ct. Cl., 659; s. c., 96 U. S., 567; Real Estate Savings Bank's case, 16 Ct. Cl., 335; s. c., 104 U. S., 728.)

And the court then said:

"That officer [the Commissioner of Internal Revenue, in making the allowance of a claim,] was in the exercise of an extraordinary power, under special statutes and regulations prescribing the occasion and mode of its exercise, and no presumption arises in favor of his juris-

showing that the internal revenue taxes have been paid on the following-described merchandise, viz, 340 cases chairs, valued at \$4,815, at 5 per cent., and 71 cases do., valued at \$2,058, at 5 per cent., as specified in the accompanying papers, and that the same were [duly] exported from the port of New York and [a bond executed, with sufficient sureties, conditioned] that the same [be] were not relanded within the United States.

And I do further certify that C. and G. C. Winchester, of Ashburnham, Mass., are entitled to an allowance or drawback thereon amounting to three hundred forty-three and 7/8 dollars, as provided by section 171, act of June 30, 1864, Dept. Regulations of August 18, 1864.

GREEN B. RAUM,
Commissioner.

To Hon. D. S. ALEXANDER,
Fifth Auditor of the Treasury.

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diction; on the contrary, the facts which give him jurisdiction must *affirmatively appear*, or his proceedings will be held illegal and void." (Thatcher v. Powell, 6 Wheat., 119; Walker v. Turner, 9 *id.*, 541; Harvey v. Tyler, 2 Wall., 328; Green v. Haskell, 24 Me., 180; Bridge v. Ford, 4 Mass., 641; Hall v. Howd, 10 Conn., 514; Snediker v. Quick, 1 Green, 306; Bridge and others v. Bracken, 3 Chand., 75; Firebaugh v. Hall, 63 Ill., 81).

It was further said by the court:

"We held in *Campbell's case* (12 Ct. Cl., 470), so we hold here, that a drawback is a mere *gratuity*, proffered by the Government, [and] imposing no obligation on the Government until the exporter's right thereto is ascertained and established in the manner prescribed by law; and that not until after *all the preliminary steps and acts* have been taken and done *in accordance with law and regulations* can a claimant's right to the drawback become established." (Davis's case, 17 Ct. Cl., 300; s. c., 1 Lawrence, Compt. Dec., 2d ed., 258. 703.) See *United States v. Savings Bank* (104 U. S., 728).

In Davis's case the Court of Claims had before it "all the documents and facts pertaining to the" action of the Commissioner of Internal Revenue, and concluded by saying that:

"The claimant, by the production of the Commissioner's certificate of allowance, presents a *prima facie* case as to all the facts necessary for his decision, *except as to his jurisdiction*. On that point it is the duty of the court to inquire whether *all* the preliminary proceedings required by the regulations were duly taken in order to confer jurisdiction on him; and if it appear that *any* of them was not so taken, the certificate is valueless as a basis for a judgment against the Government.

* * * * *

"Before the Commissioner of Internal Revenue could legally allow, or even consider this claim, it was indispensable that it should appear, in the way prescribed by the regulations, that the certificate and affidavit showing the payment of the tax were filed with the superintendent of exports 'within sixty days after the clearing of the vessel on which the merchandise was laden.' Not only was that fact not shown, but, on the face of the papers, it was plain that it could not be shown; for those papers had no existence for months after the sixty days expired.

"Such being the case, the Commissioner had no authority to consider, much less to adjudicate, the claimant's demand; and therefore his allowance of it was simply a nullity, upon which no possible right of action could be based."

October 5, 1883, the Secretary of the Treasury, in stating his conclusions on a similar claim, said:

"I am not disposed to assent to the position taken by the Court of Claims (in 12 vol., 470; and 17 vol., 292), that the allowance of a drawback is a *gratuity*. In the case of imported goods, the Government says to the citizen, that he must pay the duties; but, yet, if he imports and *re-exports*, he need pay no duties, save 10 per cent. for expenses. And it says, further, that goods of domestic manufacture, subject to internal-revenue taxes, may be exported without payment of tax, or with benefit of drawback—the policy of the Government being not to make such taxes an obstacle to competition with products of the same kind in foreign countries.

"In either case the *exporting* is what entitles the exporter to the exemption, or the drawback. A compliance with the regulations is only furnishing the evidence that he has exported.

"It does not *give* him the right. It shows only that the right exists. When, in view of the statutory exemption, he has taken action to his harm, if the right of exemption is denied, it is not a gratuity; it is a right earned, or at least a privilege earned. The statute, and his action under it, is [are] as near a contract as such things can be, and a compliance with the regulations is but the proof that he has fulfilled his part of the contract.

"If he is prevented [from] furnishing his proof by the refusal of an agent of the other contracting party to do an act enjoined upon him to do when certain facts are shown to him to exist, the failure by reason of that prevention is not to be charged against him.

"I have had occasion elsewhere to consider this subject, and I refer to that occasion for a further expression of my views. See *Bowery National Bank v. Mayor, &c., of N. Y.* (63 N. Y., 336).

"I think that the claimant is entitled to the drawback, if the absence of the action of the collector, or his neglect, is the only objection raised."

The conclusions reached in this case will now be stated :

I. The allowance made by the Commissioner of Internal Revenue is not conclusive on the accounting officers. The reasons for this conclusion have been elsewhere given (1 Lawrence, Compt. Dec., 2d ed., App., Ch. XII, 509; 1 Lawrence, Compt. Dec., 2d ed., 703; Worrall's case, 2 Lawrence, Compt. Dec., 2d ed., 490; Malakof Bitters case, 3 Lawrence, Compt. Dec., 129; *United States v. Savings Bank*, 104 U. S., 733; act June 14, 1878—20 Stat., 130, sec. 4; Rev. Stat., 184-187, 191; 15 Op. Att.-Gen., 139).

The act of June 30, 1864 (13 Stat., 302, sec. 171), expressly requires "the evidence that any such [internal-revenue] duty or tax has been paid to be furnished to the satisfaction of the Commissioner of Internal Revenue;" and it further requires "the amount [of the drawback] to be ascertained under such regulations as shall * * * be prescribed." This does not make any finding of fact by the Commissioner conclusive on accounting officers. These officers are charged by express statute with the duty of re-examining the evidence and of reaching their own conclusions of fact (Rev. Stat., 191, 236, 269, 277; 1 Lawrence, Compt. Dec., 2d ed., App., Ch. I, 416; House Ex. Doc., No. 27—2d sess., 45th Congress, p. 43, *per French*, Ass't Sec'y Treas'y). No statute has interfered with the exercise of this power, and no regulation can, nor has any attempted to do so. The statute, in imposing the one duty on the Commissioner, does not *in terms* repeal, even *quoad hoc*, the statutes imposing the same and still larger duties on accounting officers (Rev. Stat., 184-187). No repeal can be raised by implication, because this is not favored. And the statute imposing this one duty on the Commissioner is *affirmative* in terms, with *no negative implied*. Such statute cannot repeal, even *pro tanto*, any other statute, giving powers to, or imposing duties upon, accounting officers (Bishop, Written Laws, 153, 154; Hard-

castle, Statutory Law, 167; Sedgwick, Construction Stat. and Const. L., 2d ed., 31). When the Commissioner has done all that the statute requires of him, and has found the fact of payment of the tax, only one step is taken in support of a claim, and this is by no means all that is required.

A *claim* against the United States (1) must rest upon some law, and (2) will generally require evidence of *some facts* to secure payment. The statutes and authorities already cited make it so clear as to leave no doubt, that the *general rule* is, that the proper Auditor and Comptroller are respectively made, for all purposes of executive administration, the sole and exclusive judges, each for himself, of the law and the facts, on which any claim against the United States is to be allowed or rejected. It is well settled, that *exceptions* to such general rule can only exist by force of language in a statute, which *clearly* shows their existence (Claims-Assignment case, 3 Lawrence, Compt. Dec., 29; Osage-Land case, *Id.*, 367; Mississippi Central Railroad Co.'s case, 4 *Id.*, 565). In case of *doubt*, the general rule must prevail.

Exceptions to the general rule exist, as to the findings of facts, in two classes of cases:—

1. When the *right* of a claimant is (1) fixed by statute, which (2) confers upon some designated officer the power to decide finally and authoritatively on the *existence of the facts*, which give a right to payment. There are occasional examples of this class (1 Lawrence, Compt. Dec., 2d ed., App., Ch. XII, 533, 542; Bender's case, 1 Lawrence, Compt. Dec., 2d ed., 340; Rev. Stat., 846).

2. When some statute gives a designated officer or agent authority (1) to contract for services, work, or supplies; and (2) to accept and fix the compensation therefor *after performance or delivery*, and thus incidentally to furnish evidence thereof. The authority for all this may exist, either by express statute or as an *incident* of the duty of executing appropriation and other acts. There are frequent examples of this class (1 Lawrence, Compt. Dec., 2d ed.; App. Ch. XII, 541, 543; Wilson's case, 2 Lawrence, Compt. Dec., 2d ed., 206; Leake's case, *Id.*, 436, Utah case, *Id.*, 559; Leave-of-absence case, *Id.*, 571; Exigency case, 3 Lawrence, Compt. Dec., 97; Seaman-Relief case, *Id.*, 138; Yorktown Centennial case, *Id.*, 141; District Attorneys' Assistants' case, 4 *Id.*, 113). All allowances are subject to the limitation, that they cannot be made *in violation of law*; and, as to this, the accounting officers must finally determine.

3. There is a third class of cases, of which the case now under consideration is one, and in which (1) the claimant's right exists by law, (2) the *facts* necessary to support it are *specified by law or regulations*, or both, and (3) *some* or *all* of these facts, as an *additional safeguard*, are required to be established to the satisfaction of some designated officer (4) before the claim passes to the regular accounting officers for their independent and final executive action. In these cases the statute

gives no specified effect to the findings of such designated officer, who exercises *none* of the *conclusive and discretionary power* which is called into requisition in the first two classes of cases mentioned. His power is only to pronounce an opinion on facts generally, of which he may have some official evidence. The exercise of this power by him is a mere step preceding the regular process of accounting, and has no conclusive effect, either by any statute, or as the result of the *discretionary power* entrusted to his judgement, but is *subject* by express statute to the *revisory power* and final action of accounting officers (Consular-Accounts case, 3 Lawrence, Compt. Dec., 349, and cases already cited).

In some cases, the allowance of a claim, or approval of a voucher, is *prima facie* evidence of a right to payment of a specified sum, but it is still open to inquiry (Salomon v. United States, 19 Wall., 17; s. c., 9 Ct. Cl., 54; Parish's case, 2 *Id.*, 341; McCann's case, 18 *Id.*, 447; Malakof Bitters' case, 3 Lawrence, Compt. Dec., 135). The accounting officers may receive and consider new and original evidence not presented to the Commissioner of Internal Revenue (Rev. Stat., 184-187). And if an officer or agent is authorized to contract for services or supplies and to fix the amount of compensation to be paid therefor on performance or delivery, the accounting officers may, even as against vouchers approved by such officer or agent, ascertain whether the services were rendered, or the supplies furnished, and whether all conformed to the contract. So, if the contract be to pay a *quantum meruit* or *quantum valebat*, the amount is open to inquiry by the accounting officers.

II. The question, whether the allowance by the Commissioner of Internal Revenue of a drawback claim gives a *prima facie* right of action in the Court of Claims, is one not requiring any consideration by the accounting officers. That is a question for the courts, on which accounting officers have no right to express an opinion, just as courts have no right to express any opinion on the powers or duties of accounting officers, when not involved in a judicial inquiry. See Barnett & Co.'s case (16 Ct. Cl., 516), and compare with United States v. Savings Bank (104 U. S., 733; s. c., 16 Ct. Cl., 335). See also 1 Lawrence, Comp. Dec. (2d ed., App., Ch. XII, 541, 559). Whatever may be the effect of the allowance by the Commissioner of Internal Revenue of a drawback claim, either in an action in the Court of Claims, or as evidence before the accounting officers, it is clear that he exercises a special and statutory jurisdiction, and that such allowance is without effect unless the record of his proceedings shows the facts which in law and under the regulations give him jurisdiction (Sallu's Case, 1 Lawrence, Compt. Dec., 2d ed., 223; Hardcastle, Statutory Law, 134, citing Peacock v. R., 27 L. J., Q. B., 224). And it is equally well settled that he is not the final judge of the existence of the facts which give him jurisdiction.

Accounting officers exercise a general jurisdiction under general statutes. It is not necessary that the record of the action of a comptroller

should affirmatively show that the preliminary steps have been taken which give him jurisdiction. This may be shown *aliunde* (15 Op. Att.-Gen., 140).

In this case, as the allowance of the Commissioner is "a mere step in the system of internal-revenue laws, which provide a complete remedy"—in other words, a mere step in the system of accounting (House Ex. Doc., No. 27—2d Sess., 45th Congress, p. 43)—as the Fifth Auditor and First Comptroller have jurisdiction of the claims by express statute (1 Lawrence, Compt. Dec., 2d ed., App., Ch. I, 416; Rev. Stat., 236, 269, 277; Act June 14, 1878—20 Stat., 130, sec. 4), and, as they have in the regular course reached the First Comptroller, his jurisdiction to decide thereon is well established.

III. The act of June 30, 1864 (13 Stat., 302, sec. 171, &c.), requires three matters to be ascertained, before a claim for drawback can be paid, viz: (1) that goods manufactured in the United States have been exported; (2) that the internal-revenue tax thereon has been paid; and, (3) the amount of the drawback to be paid. These are to be ascertained "under such regulations as shall * * * be prescribed by the Commissioner of Internal Revenue, under the direction of the Secretary of the Treasury." The *statute* does not declare how, or by whom, these matters are to be ascertained, except that it does require "evidence * * * to be furnished to the satisfaction of the Commissioner of Internal Revenue"—that the internal-revenue tax has been paid on goods exported—before a drawback can be allowed. There is a manifest propriety in this requirement. The records of the office of the Commissioner, when collectors have performed their proper duties, will furnish this evidence: and, when they have not, he has ample means, through his subordinate officers and otherwise, of ascertaining the facts. If, in any case, evidence of payment is *not* "furnished to * * * [his] satisfaction," the question, whether the accounting officers can proceed to act thereon, will arise; but no such question is now presented for decision. If evidence of payment is "furnished to the satisfaction of the Commissioner" on any given claim, it passes to the Fifth Auditor, and then to the First Comptroller, for the separate and independent action of these officers, respectively. The duty of each of them, also to find for himself the existence of the requisite facts, is equally prescribed by statute, as already shown. The *statute* does not limit the Commissioner to *record evidence* in order that he may be satisfied that the internal-revenue tax has been paid. The evidence on this subject is "to be furnished to the *satisfaction* of the Commissioner." This admits *any* lawful evidence (*Noble v. The United States*, Dev., Ct. Cl., 84; *Magruder v. The United*, *Id.*, 85). If the original evidence authorized by law was *never made*, or is *lost*, secondary or any competent evidence, which is satisfactory, is all that the *statute* requires. But, in addition to what is required by *statute*, certain authorized "*regulations*" have been prescribed, specifying *seven* distinct steps or proceedings to be taken, *four* by the ex-

porter and *three* by officers of the Government. These regulations have the force of law. If the Commissioner of Internal Revenue had no jurisdiction unless "*all* the preliminary proceedings required by the regulations were duly taken" in this case, and if the failure to comply in *all* respects therewith is fatal to the claims, they must be rejected, because none of the regulations were complied with, except in part, as already stated. Thus, the question is squarely presented, whether a full compliance with all the regulations is essential to give the claimants a right to payment. A failure to comply with the regulations may exist (1) on the part of Government officers, and (2) on the part of a claimant. It may exist on the part of an *officer*, because of:—

(1). The (*a*) honest neglect, the (*b*) fault, or the (*c*) fraud of such officer; or,

(2). His inability to do so, by reason of some prior failure of the claimant to comply with regulations.

It may exist on the part of a *claimant*, because of:—

(1). His inability to do so by reason of the omission of some officer first to perform his duty; or

(2). The (*a*) honest neglect, the (*b*) fault, or the (*c*) fraud of the claimant.

The failure to comply with regulations by an officer, because of his neglect, fault, or fraud, and the failure of a claimant to comply with regulations in consequence of the previous failure of the officer, are affected by the same or similar principles, and will be considered together.

1. Thus, in this case, if all the steps required by the first *six regulations* had been taken, and the superintendent of exports had, without any or without sufficient reason therefor, neglected or refused, as required by the *seventh* regulation, to "issue a certificate of the amount of drawback due" to the claimants, or had so neglected or refused to "transmit a complete set of original proofs, except the landing certificate, to the Commissioner of Internal Revenue," the claimants would be without fault, and the officer would be exclusively in fault. In such case, the claimants, *on sufficient evidence of the facts*, are entitled to payment of drawback, although "all the preliminary proceedings required by the regulations were [not] duly taken" (Woolner's case, 13 Ct. Cls., 365). This must be so in reason and justice, and on well settled principles. The statute, which gives the right to drawback, is in the nature of a *contract*, in which the Government promises to pay a claimant an ascertainable sum on sundry conditions precedent, some of which are to be performed by officers of the Government, and others by the claimant. The contract is one highly favored by the policy of the statute, which seeks to invite and encourage exports. The drawback payment, which the statute promises to make, is not a gift or gratuity—the right to it is as completely earned as any right can be by performing the conditions of a contract or a statute. A gratuity is something given without any recompense or equivalent—a free gift. A party, who pays internal-revenue tax on

goods of his own manufacture, and then exports them, earns his right to drawback, as fully as a ship-owner earns his right to freights on goods which he carries to a foreign port for, and at the request of, the Government under a statute promising to pay him for the service. The character of the right to drawback is only material, however, on the assumption, that a claimant for a gratuity under a statute promising it is to be held to *stricter* performance of the conditions precedent to the right, than is a party who is demanding a right fully earned by a valuable *quid pro quo*. But, whether payment of a drawback is a gratuity, or arises upon a right earned as a just recompense, such payment cannot be defeated by the sole failure of a Government officer to perform a duty in furnishing evidence required by regulations (Woolner's case, 13 C. Cl., 365). It would be abhorrent to reason, and a manifest injustice, to permit a right to be thus defeated. In a controversy between private citizens, involving a similar principle, no party has ever been permitted to plead *his own wrongful default* to save himself from a liability, which would exist, if he had performed his duty. The rule of law goes still further, and relieves a claimant from performing conditions, which *he has agreed and failed to perform*, when his failure is caused by the fault of the party liable in case of performance. Thus, it is shown by high authority, in discussing the subject of "excuse for non-performance of a condition precedent," that performance is excused, if "the defendant either *prevented* the performance, or rendered it unnecessary to do the prior act, by his neglect, or by his *discharging* the plaintiff from performance" (1 Chitty, Pl., 326, citing *Hotham v. The East India Co.*, 1 T. R., 638; *Co.*, Litt., 206 b; *Bowes and others v. Howe*, 5 Taun., 30; *Ferry v. Williams*, 8 *Id.*, 70; *Smith v. Wilson*, 8 East, 443) and see *Newcomb v. Brackett* (16 Mass., 161).

And again, it said, that:

"If one party is prevented from fully performing his contract by the fault of the other party, it is clear that the party thus in fault cannot be allowed to take advantage of his own wrong, and screen himself from payment for what has been done under the contract" (2 Parsons, Cont., 6th ed., 523, citing *Planché v. Colburn*, 8 Bing., 14; *Goodman v. Pocock*, 15 Q. B., 576; *Moulton v. Trask*, 9 Met., 577; *Hoagland v. Moore*, 2 Blackf., 167; *Bannister v. Read*, 1 Gilman, Ill., 92; *Selby v. Hutchinson*, 4 *Id.*, 319; *Webster v. Enfield*, 5 *Id.*, 298; *Derby v. Johnson*, 21 Vt., 17; *Clark v. Marsiglia*, 1 Denio, 317).

In *Bowery National Bank v. Mayor, &c.*, of the City of New York (63 N. Y., 336, 339, 340) an officer—the water purveyor—refused to give to a claimant entitled thereto a certificate of the performance of a contract, because such officer was enjoined by a court from doing so: *Folger, J.*, in deciding that this refusal could not in law defeat the right of the claimant to recover, said:

"It was necessary for them, either to prove upon the trial the making of such certificate by him [the water purveyor], or to show that it was refused unreasonably, or in bad faith. It was unreasonable to re-

fuse it, if it ought in the contemplation of the contract, to have been given. In such contemplation it ought thus to have been given, when in very fact and beyond all pretence of dispute, the state of things existed, to which the water purveyor was to certify, to wit: the full completion of the contract in each and every one of its stipulations. That such state of things did exist, is conceded. It is claimed, however, that the water purveyor refused, because he was forbidden by the valid injunction order of a competent judicial officer, and that hence he had good reason for refusing. This might be a protection to him from personal consequences. Such interference by a third party does not, however, enter into consideration of the question, whether a contracting party is to be excused from the literal observance of a technical condition precedent, where there is a lack of good reason for exacting strict performance. In that consideration, we have to do only with the circumstances of the contract, and the objects sought to be accomplished by that condition in it, and whether those, being strictly held and applied in all force against the promisor, the whole purpose of the condition has been fully and exactly achieved. Then, for the umpire between the contracting parties to refuse his formal approval, is unreasonable; because there is nothing in the situation of the contracting parties, nor in the way in which they have performed the contract, nor in any of the results anticipated by the conditions of it, that renders a refusal just or proper. It would be unreasonable, that if the judgment of the umpire had pronounced the contract fully completed, his sudden physical infirmity (his insanity for example), or his death, disabling him from putting his signature to a certificate to that effect, should deprive the contractor of a right of action, on account of the non-production of it. The injunction order is like that—it is that. It has not prevented the assent of the skill and judgment of the water purveyor, that the contract has been fully completed. It only stays his hand from expressing in writing his conviction. A refusal for that cause, is based upon something, far apart from the non-performance by the contractor of his duty under the contract, far apart from the attainment by the municipality of the objects and benefits of the condition; something which is the act of a stranger to the contract, and should not affect the contractor, and hence is, as to him, and as to the contract and conditions, unreasonable.

“When it was conceded, that the assignors of the plaintiffs had fully completed the contract, that the refusal to give a certificate admitted that fact, and was founded upon something extrinsic to their performance; that refusal was unreasonable, in a proper application of the legal idea of that term, in such connection.”*

* Since the foregoing was written the recently published volume 107 of the Supreme Court Reports, containing the case of *Campbell v. United States*, reviews the decision in the *Campbell* case, 12 Court Cl., 470, and thus sustains some points above decided by the Comptroller.

Mr. Justice Miller, in delivering the opinion in *Campbell v. United States*, 107 U. S., 410-411, says:

The argument of counsel for the United States is, that until the officers of the customs comply with all the regulations of the Secretary of the Treasury, and the collector issues the drawback certificate, the law imposes upon the United States no obligation to pay anything for such drawback; that the law conferred upon the Secretary the right to make the regulations, and the collector the power to make the certificate for payment of drawback, and that the refusal of the collector to perform the duties imposed upon him preliminary to making his certificate, and then refusing the certificate, totally defeats the claim of the party, who, by the law, is guaranteed

The conclusion is irresistible that, as a general rule, one party to a contract, who performs all the conditions which it requires of him, except such as he cannot perform by reason of the fault of the other party, is entitled to a remedy under such contract. The Government may not generally be liable for the torts, misfeasances, or non-feasances of its officers (*Gibbons v. United States*, 8 Wall., 269; *Nichols v. United States*, 7 *Id.*, 122; *United States v. Kirkpatrick*, 9 Wheat., 720; *Dox et al. v. The Postmaster-General*, 1 Pet., 318; *Conwell v. Voorhees*, 13 Ohio, 523; the *Flushing Ferry Co's case*, 6 Ct. Cl., 1; Keifer's speech, House Reps., December 13, 1878; Lawrence, Law of Claims against Governments, House Report, No. 134, 2 sess., 42 Cong., ch. IV, p. 274); but, in its dealings in the nature of contract with a citizen, it is generally subjected to the same rules of law and evidence as any other corporation or person (*The United States v. Bank of the Metropolis*, 15 Pet., 377; *Cotton v. The United States*, 11 How., 231; *The Floyd Acceptances*, 7 Wall., 666; *Vermilye & Co. v. Adams Express Co.*, 21 *Id.*, 138; *United States v. Cook*, 19 *Id.*, 594; *Cooke et al. v. United States*, 91 U. S., 396; 4 Op. Att.-Gen., 90; *Id.*, 295; 8 *Id.*, 1). For the reasons stated, it is held that the *wrongful* failure of an officer of the Government to furnish evidence in support of a drawback claim, which it is his duty to furnish, cannot defeat such claim. His failure to do so is wrongful, whether occasioned by (a) honest neglect, (b) fault, or (c) fraud. This conclusion is reached.

a right to his drawback, and who has complied with all that the law requires of him to secure and enforce it. To the same effect is the opinion of the Court of Claims.

It would be a curious thing to hold that Congress, after clearly defining the right of the importer to receive drawback upon subsequent exportation of the imported article on which he had paid duty, had empowered the Secretary by regulations, which might be proper to secure the Government against fraud, to defeat totally the right which Congress had granted. If the regulations of themselves worked such a result, no court would hesitate to hold them invalid as being altogether unreasonable.

But the regulations in this case are not unreasonable, nor do they interpose any obstacle to the full assertion and adjustment of plaintiff's right. * * *

The Court of Claims makes the mistake of supposing that the claim is founded on the regulations of the Secretary of the Treasury. This view cannot be sustained. It is the law which gives the right, and the fact that the custom officers refuse to obey these regulations cannot defeat a right which the act of Congress gives. * * *

Neither the act of Congress, nor any rule of construction known to us, makes the claimant's right, when the facts on which it depends are clearly established, to turn upon the view which the collector, or the Secretary, or both combined, may entertain of the law upon that subject, and much less upon their arbitrary refusal to perform the services which the law imposes on them.

A suggestion is made that the right to enforce the drawback in the court is affected by the fact that it is a gratuity.

It has never been supposed that there was a gratuity in all the cases where the imports are free of duty. The purpose of the drawback provision is to make duty free, imports which are manufactured here and then returned whence they came or to some other foreign country, articles which are not sold or consumed in the United States. * * * But if it were a free gift, it is not for the officers of the Government to defeat the will of Congress on this subject by refusing to execute the law. (See *Railroad Company v. Smith*, 9 Wall., 99; *French v. Fyan*, 93 U. S., 17.)

without inquiring now as to the *directory* character of the *regulation* requiring such official action and evidence.

2. The failure of an officer to comply with regulations may arise by reason of a similar failure of a claimant, without fraud, and these double failures are affected by the same or similar principles, and, for all practical purposes, may be resolved into the single failure of the claimant. If the regulations are *absolute*, such failure is fatal to a claim for drawback: if the regulations are *directory*, it is not necessarily so. The two principal and essential facts which give a right to drawback-payment, and which are of the *essence* and substance of the right, are the *payment* of internal-revenue tax by the manufacturer on his products, and their *exportation*. The chief and essential objects of the regulations are, to secure the evidence, official and otherwise, of these two facts, and to limit the time, within which certain acts shall be done, and within which some of the requisite evidence shall be filed. Thus, the regulations *direct* the exporter—(1) at least six hours previous to lading articles on shipboard for export, to file with the collector of customs a notice of intention to export; (2) within ten days after the clearing of a vessel, to file with the collector an entry of the merchandise, and an affidavit in prescribed form; (3) within sixty days after the clearing of the vessel, on which the exported goods were laden, to file with the superintendent of exports a bill of lading, and a certificate from the collector of internal revenue of the payment of tax; and (4), within a reasonable time, to file with the superintendent of exports a landing certificate. The regulations also *direct* the proper officers as to the manner of performing prescribed duties, and of furnishing specified forms of evidence, and finally require the superintendent of exports to transmit a complete set of original proofs, except the landing certificates, to the Commissioner of Internal Revenue, in order that he may award the amount due to the claimant. These regulations do not, in terms, declare that proofs secured in the forms which such regulations require shall be the exclusive or only evidence which may be received to support a claim, or that, if any required act is not done, or any required evidence is not filed within the specified time, a later period will not be permitted: they are *affirmative*, not *negative*, in terms.

The question remains, whether the regulations mentioned are *absolute* or *directory*.* The difference between the effect of a *mandatory*, or per-

* In *Hardcastle* (Statutory Law, 15) it is said:

"The epithet '*Imperative*' is used with regard both to enabling acts, and also with regard to statutes which create duties. A statute which creates a duty is called '*imperative*' if it is not *optional* whether that duty be performed or not. Again, when a statute is passed for the purpose of enabling something to be done, and which prescribes the formalities which are to attend its performance, those prescribed formalities which are essential to the validity of the thing when done are called *imperative* or *absolute*; but those which are not essential, and may be disregarded without invalidating the thing to be done, are called *directory*."

In a foot note *Hardcastle* (*Id.*) says:

"Mr. Sedgwick, in his treatise on Statutory Law, ed. 2, p. 318, points out that it is somewhat singular that this epithet, '*directory*,' should be used in this sense when applied to statutes, whereas, strictly speaking, it is synonymous with '*mandatory*.'"

haps it may more properly be called an *absolute*, statute and of a *directory* one, has been well described by saying, that—

“If an *absolute* enactment be neglected or contravened, a court of law will treat the thing which is being done as invalid and altogether void, but if an enactment be merely *directory*, it is immaterial, so far as relates to the validity of the thing which is being done, whether it is complied with or not” (Hardeastle, Statutory Law, 128).

It was said by Lord Campbell in *Liverpool Bank v. Turner* (30 L. J., Ch., 380), with regard to enactments expressed in mere *affirmative* language, that:

“No universal rule can be laid down as to whether *mandatory* enactments shall be considered *directory* only, or *obligatory*, * * * but it is the duty of courts of justice to try to get at the *real intention of the legislature* by carefully attending to the whole scope of the statute to be construed” (Hardeastle, Statutory Law, 129).

The authorities recognize a difference between statutes in affirmative, and those in negative, terms. Thus, it is said:

“If the requirements of a statute which prescribes the manner in which something is to be done be expressed in negative language, that is to say, if the statute enact that it shall be done in such a manner and *in no other manner*, it has been laid down that these requirements are in all cases absolute, and that neglect to attend to them will invalidate the whole proceeding” (Hardeastle, Statutory Law, 130).

But, when a statute affirmatively prescribes or regulates the way in which something is to be done, with no negative expressed, such statute is generally, but not always, *directory*. The rule, by which it may generally be determined, whether such statute is *absolute* or *directory*, has been stated by Lord Mansfield in *Rex v. Loxdale* (1 Burr., 447); in which case he says:

“There is a known distinction between circumstances *which are of the essence of a thing required to be done* by an act of Parliament, and clauses *merely directory*.”

In *Pearce v. Morrice* (2 Ad. and E., 96), Taunton, J., said that he understood “the distinction to be, that a clause is *directory* where the provisions contain mere matter of direction and nothing more” (Hardeastle, Statutory Law, 134). There are many cases, which illustrate

Thus, in *Enticastle v. Dent*, 1 Ex., 823, Pollock, C. B., used the word with regard to a commercial letter of instructions in the sense of ‘mandatory.’”

Bishop, in his work on the Written Laws, generally uses the word, “mandatory,” and sometimes “imperative,” as the opposite of “directory.”

In Potter's Dwaris (Statutes, 221), it is said:

“Statutes also are sometimes only *directory* what is to be done; at other times *compulsory*: that is, according to their provisions, *discretionary* or *imperative*. The stat., 43 Eliz., c. 2, s. 5, enacted that male apprentices should be bound out by the parish till the age of twenty-four; yet a binding till twenty-one was held to confer a settlement; for the statute is only *directory*, and not *compulsory* in this respect.

“In *Pearce v. Morrice*, Taunton, J., said: ‘I understand the distinction between *directory* and *imperative* statutes to be that a clause is *directory*, when the provisions contain mere matter of direction and nothing more; but not so, where they are followed by such words as are used here, viz: that anything done contrary to such provisions shall be null and void to all intents. These words give a direct, positive, and absolute prohibition. If they are not *obligatory*, I cannot conceive to myself any words which can have a prohibitory force.’”

the principle that, when a statute *directs* that evidence be furnished in given forms and within specified times, with no express or implied negative as to other forms or times, such statute is merely *directory*.

In Bishop (Written Laws, 255), it is said:

"Generally, when no rights will be impaired, *provisions*, with no negative words or implications, *concerning the time and manner, and more especially the time, in which official persons shall perform designated acts, are directory*.* Of this sort, for example, is the requirement that the court which sentences a prisoner to the State prison 'shall so limit the time of sentence that it will expire between the months of March and November.' A sentence, in disregard of it, is not void. And largely the statutes relating to the time and manner of summoning and bringing in jurors are of this class. The same is true of those providing for other steps in a judicial cause. But a provision of this or any other sort which, though in the nature of a command to an officer or court, confers rights on parties, is generally or always mandatory. A familiar illustration of this kind of statute is one giving the prevailing party costs; they cannot be withheld at the discretion of the judge."

Time is not generally of the essence of a contract, unless made so by its terms or evident purpose (3 Parsons, Cont., 6th ed., 384).

The regulations applicable here were not designed as a *statute of limitations* against the *right* of a claimant, but only to *expedite* the performance of certain acts, and the furnishing of evidence.

Regulations may be *absolute* or *directory* in their application to accounting officers. The authority which makes them can modify or suspend them as to any case, or class of cases, or generally.

The conclusions are (1) that, on established legal principles, the "*essence*" of the evidence required of a claimant for drawback is sufficient legal proof that he has manufactured goods, has paid the internal-revenue tax thereon, and has exported the same; (2) that the regulations on the subject of evidence in support of these facts are *directory*

* In support of this, Bishop cites: Pond v. Negus, 3 Mass., 230; Rex v. Leicester, 7 B. and C., 6; Rex v. Denbyshire, 4 East, 442; Reg. v. Rochester, 7 Ellis and B., 910; Reg. v. Ingall, 2 Q. B. D., 199; People v. Allen, 6 Wend., 486; People v. Peck, 11 Wend., 64; Marchant v. Langworthy, 6 Hill, N. Y., 646; Hooker v. Young, 5 Cow., 269; *ex parte* Heath, 3 Hill, N. Y., 42; Colt v. Eves, 12 Conn., 243; Wan-kon-chaw-neek-kaw v. United States, Morris, 332, 335; Walker v. Chapman, 22 Ala., 116; People v. Cook, 14 Barb., 259; the State v. Chick, 2 Ala., 26; McGuffie v. the State, 17 Ga., 497; Hart v. Plum, 14 Cal., 148; People v. Lake, 33 Id., 487; Wheeler v. Chicago, 24 Ill., 105; Saint Louis County Court v. Sparks, 10 Misso., 117; Blimm v. Commonwealth, 7 Bush, 320; Torrey v. Millbury, 21 Pick., 64; Parchman v. the State, 2 Texas, Ap., 228; Lackawanna Iron, &c., Co. v. Little Wolf, 38 Wis., 152; Rex v. Sparrow, 2 Stra., 1123; the State v. Camden, 10 Vroom, 620; Lee v. the State, 49 Ala., 43; Limestone v. Rather, 48 Ala., 433; Ryan v. Valandingham, 7 Ind., 416; Merrill v. the State, 46 Ala., 82; Boykin v. the State, 50 Missis., 375; Wright v. Sperry, 21 Wis., 331; McRoberts v. Winant, 15 Abb., Pr., N. S., 210; Le Feuvre v. Miller, 8 Ellis and B., 321. And see, besides the other cases cited to this section, Striker v. Kelly, 7 Hill, N. Y., 9; Wiggin v. New York, 9 Paige, 16; McBee v. Hoke, 2 Speers, 138; the State v. Hill, Id., 150; Eunus v. Kidder, 26 Maine, 97; Rex v. Page, 12 Mod., 123; Rex v. Ingram, 1 Ld. Raym., 215; Steele v. the State, 1 Texas, 142; Dyches v. the State, 24 Id., 266; People v. Weller, 11 Cal., 49.

as to its form and the time of furnishing it, and of performing the acts required as a means of supplying proofs; and (3) that this construction is essential to attain substantial justice and to secure to manufacturers and exporters rights, which the policy of the law regards as entitled to favor and protection.

3. If a claimant for drawback fraudulently disregards the regulations, he cannot ask the aid of accounting officers to relieve him from the consequence of his own wrong, or to secure payment.

The foregoing principles have been stated because of their importance in considering claims in the Treasury Department. The claims now being considered must be disallowed, not because of a failure to comply with the regulations, but because of the total failure to furnish evidence sufficient under the statute to justify payment.

TREASURY DEPARTMENT,

First Comptroller's Office, January 15, 1884.

IN THE MATTER OF THE PAYMENT OF THE FEES OF THE MARSHAL OF THE DISTRICT OF COLUMBIA FOR SERVICES IN CASES IN THE POLICE COURT OF THE DISTRICT.—McMICHAEL'S CASE.

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1. The fees due the Marshal of the District of Columbia for services in cases in the police court of said District, and the other expenses of said court are payable from appropriations made by Congress for the expenses of the District.
 2. The act of June 17, 1870 (16 Stat., 155, sec. 15), and the act of February 21, 1871 (*Id.*, 429, sec. 4), as carried into the Revised Statutes relating to the District of Columbia, sections 1079 and 1080, in relation to the payment of such fees and expenses from fines, penalties, and forfeitures adjudged in said court, are modified by the act of June 11, 1878 (20 *Id.*, 104, sec. 3, 4), and by the act of July 1, 1882 (22 *Id.*, 144, sec. 3).
 3. Bundy's case (1 Lawrence, Compt. Dec., 2d ed., 184), followed.
 4. The marshal of the District of Columbia should submit monthly accounts for his completed service to the Commissioners of the District.
 5. The returns made by the marshal or his deputy on writs issued from the police court showing service thereof are not conclusive upon the Commissioners of the District.
 6. The major of police may serve process in certain cases specified by statute.

December 13, 1883, Clayton McMichael, Marshal of the District of Columbia, by letter submitted to the First Comptroller certain questions relative to the payment by the Commissioners of the District of Columbia of fees for his services in cases in the Police Court of the District, which are answered by the following opinion:

OPINION BY WILLIAM LAWRENCE, First Comptroller.

1. One inquiry is, whether the Marshal's fees and other expenses of the Police Court should be paid out of fines, penalties, and forfeitures

adjudged in said court, and the surplus be turned over by the Marshal to the Collector of the District. The acts of June 17, 1870 (16 Stat., 155, sec. 15), and the act of February 21, 1871 (16 *Id.*, 429, sec. 41), as carried into the Revised Statutes relating to the District of Columbia, sections 1079 and 1080, are cited as supporting an affirmative answer to this question. But these provisions are modified by the act of June 11, 1878 (20 *Id.*, 104, sec. 3, 4), which requires the Commissioners of the District to submit to Congress estimates, including an "itemized statement and estimate of the amount necessary to defray the expenses of the government of the District of Columbia" for each fiscal year, and which provides that "the appropriations to be made by Congress * * * shall be disbursed for the expenses of said District, on itemized vouchers * * * approved by the Auditor of the District"; and by the act of July 1, 1882 (22 *Id.*, 144, sec. 3), which provides that "all revenues of the District * * * from taxes or otherwise shall be deposited in the Treasury of the United States as required by the provisions of section four of an act approved June eleventh, eighteen hundred and seventy-eight, and shall be drawn therefrom only on requisition of the Commissioners of the District * * * specifying the appropriation upon which the same is drawn." See also act March 3, 1879 (20 Stat., 410); act March 3, 1881 (21 *Id.*, 466, sec. 2); act March 3, 1883 (22 *Id.*, 470, sec. 2). This is further shown by the acts making appropriations for the expenses of the District, specifying expenses of the Police Court, and "United States Marshal's fees." Act March 3, 1833 (*Id.*, 467); and prior appropriation acts. This question has already been decided. (Bundy's case, 1 Lawrence, Compt. Dec., 2d ed., 184).

2. The statute requires the accounts of disbursements of the Commissioners of the District to be made monthly to the accounting officers of the Treasury Department. (Rev. Stat., 3622; act March 3, 1883, 22 Stat., 471, sec. 2; and prior appropriation acts for the District.) The inference seems properly to follow that the Marshal should submit monthly accounts for his completed service to the Commissioners of the District.

3. The act of June 11, 1878 (20 Stat., 105, sec. 4), provides that the disbursements for the District shall be made "on itemized vouchers which shall have been audited and approved by the auditor of the District of Columbia, certified by said Commissioners [of the District], or a majority of them." This statute devolves upon these officers the duty of ascertaining whether services claimed to have been rendered have in fact been so, and generally of ascertaining the legal validity and justice of claims presented, after which all are to be examined, and finally and authoritatively decided on by the proper accounting officers of the Treasury Department. The returns made by the Marshal or his deputy on writs issued from the Police Court showing service thereof, are not conclusive on the Commissioners, but they may ascertain their correctness upon proper evidence, and refuse payment for service if they find

it was not made by such Marshal or his deputy. *Browning v. Hanford*, 5 Den. 586; *Crocker, Sheriffs, &c.*, §45. The Major of Police may serve process in certain cases. (Rev. Stat., D. C., 1065, 1066, 1067, 1068. See *Ex parte Roberts*, 2 Abb., C. C., 265.)

The Marshal will be advised accordingly.

TREASURY DEPARTMENT.

First Comptroller's Office, January 16, 1884.

IN THE MATTER OF THE AUTHORITY OF THE HEAD OF AN EXECUTIVE DEPARTMENT TO PROHIBIT ATTORNEYS OR CLAIM AGENTS FROM ACTING FOR CLAIMANTS IN SUCH DEPARTMENTS.—CLAIM AGENTS' CASE.

1. The right, as an agent of claimants, to practice before the several departments of the government, is a property right, of which citizens cannot be deprived, except upon clear proof of their unfitness for such employment, by reason of their improper practices.
2. Proceedings before a department, for the disbarring of such agent, are analogous to proceedings in courts of law instituted for the same purpose.

The following extract from a letter addressed by the Honorable Secretary of the Interior to the Honorable Commissioner of Pensions is published for information:

DEPARTMENT OF THE INTERIOR,
Washington, January 3, 1884.

To the COMMISSIONER OF PENSIONS:

SIR: I have considered your letter of the 4th ultimo, submitting certain papers relating to E. H. G., and reiterating your recommendation of the 3d ultimo, that said [E. H. G.] be disbarred from practicing before your office. Among the papers are certain charges against [said E. H. G. and respondent's answers thereto. These charges are, in general, the presentation of a false claim for pension with intention to defraud, and false representation of pension laws as to desertion, and are met by general and specific denial on the part of respondent.

* * * * *

While it is the duty of the department to protect, as far as possible, all citizens against extortion of parties practicing before the department, as well as to protect the government, by seeing that dishonest and corrupt persons do not appear before the department as attorneys or claim agents, yet it must not be overlooked, that the agent represents persons whose interests will be injured by the disbarment of the attorney or agent, and this is especially true in cases of pension claimants, who, having paid the fee allowed by law, will be compelled to employ another attorney, who will in time also demand the fee allowed by law, thus compelling them to pay double the amount, in addition to the delay that must ensue in consequence of the employment of a person not familiar with the case. The employment of another attorney will also add largely to the work of your office, yet this objection should not govern or control the case, if the evidence is satisfactory of the unfitness of the agent or attorney to practice before the department. The right

to practice before the several departments of the government as the agents of suitors, is a right of which citizens cannot be deprived, except on proof of their unfitness for such employment. It is a property right that cannot be destroyed by the exercise of arbitrary power on the part of the head of a department. If it is alleged that such agent is not a proper person to appear before the department, the rule requires that charges be formulated and presented to the agent, and if the agent does not make satisfactory explanation, disbarment follows. Such charges must be sufficiently explicit to create an issue between the government and the respondent, if the respondent makes defense. The proceedings in cases of this character in respect to the evidence required, are analogous to cases for the disbarment of attorneys in courts of law, and must be conducted in accordance with the principles governing cases of that character. The proceeding is penal, although not strictly criminal, and the courts have uniformly required that the evidence should be more than a mere preponderance. (See in the matter of an attorney, 1 Hun., 321; Matter of Baluss, 28 Mich., 507.)

While the proceeding before the head of a department for disbarment of an attorney or claim agent practicing before the department is analogous to a proceeding in a court of record for the same purpose, it cannot be contended that the head of a department possesses more power in such a case than a court. In fact he does not possess as much. Attorney-General Hoar, speaking of the power of the Secretary of War over an agent practicing before the War Department, said: "The Secretary of War is not, however, invested with any authority over the professional conduct of claim-agents for the correction of mere private grievances, corresponding with that possessed by the courts of law over attorneys practicing therein. The relation between the latter is an official one, and from this is derived the summary jurisdiction which courts exercise over their attorneys. But as between the departments and agents prosecuting claims before them, no official relation exists; and accordingly the Secretary can derive no such authority from that source, and none is conferred upon him by any statute that has come under my notice." The head of a department cannot disbar an agent because he is ignorant or offensive to him, nor because his methods of conducting his business are not in accordance with the highest ethics of the legal profession, nor because he resorts to flaming advertisements describing his professional qualifications in the manner of the vendors of patent medicine nostrums. All these are matters of taste, with which the department has nothing to do. If the agent violates the statute, he may be punished in the courts. If he defrauds the government or attempts so to do, or defrauds his client or attempts so to do, the head of a department is authorized then to refuse to recognize him not only in the case in which his fraud was committed or attempted, but in any other. But this must be done on evidence and not on *ex-parte* charges, to which the accused has not been allowed to respond. Property rights of this character cannot be destroyed except upon clear proof.

The Supreme Court of Illinois, speaking of the profession of attorney-at-law, says: "It is to him valuable *capital*, and he ought not to be denied the right to exercise its duties, and receive the emoluments attached thereto, except upon clear *proof* of willful and corrupt professional misconduct." (People v. Barker, 56 Ill., 303.)

Chief Justice Marshall said, "the profession of an attorney is of great importance to an individual, and the prosperity of his whole life may depend on its exercise. The right to exercise it ought not to be lightly or capriciously taken from him." (*Ex-parte* Burr 9, Wheat., 530.)

After a careful personal examination of the evidence and the law governing the case, I am of the opinion that the charges in this case are not sustained. I, therefore, dismiss them, and transmit herewith such of the papers as properly belong to the files of your office.*

Very respectfully,

H. M. TELLER,
Secretary.

IN THE MATTER OF THE AUTHORITY OF THE HEAD OF AN EXECUTIVE DEPARTMENT AS TO GRANTING A LEAVE OF ABSENCE TO A CLERK OR EMPLOYÉ THEREIN.—CLERK'S ABSENCE CASE.

1. The evils against which the act of March 3, 1883 (22 Stat., 563, sec. 4), was designed to provide, were (1) the absence of clerks and employés from their duties for more than thirty days, in any one year, with the consent of the head of the department and with right to salaries, and (2) the payment of salaries to clerks and employés, absent without the authority of the head of the department.
2. The year mentioned in section 4 of said act is the *calendar* year.
3. The absence of a clerk or employé under process as a witness for the Government in a case in court is not an evil, and, hence it is reasonable to infer that the act of March 3, 1883 (22 Stat., 563, sec. 4), was not designed to apply to such absence.
4. "Cases clearly not within the mischief intended to be remedied" by a statute, are excepted from its operation.
5. The act of March 3, 1883 (22 Stat. 563, sec. 4), construed in connection with section 850 of the Revised Statutes, does not deny the right of a clerk or employé in an executive department to the payment of his salary, when absent as a witness for the Government in a case in court, although such clerk or employé has already been absent thirty days during the year in which he may be a witness.
6. The head of an executive department may, notwithstanding said act of March 3, 1883, (22 Stat., 563, sec. 4), grant a clerk or employé in his department a leave of absence without pay.
7. A leave of absence without pay, when granted under a mistake of fact, may be modified to permit payment of salary.

Sec. 850 of the Revised Statutes provides, as follows:

"When any clerk or other officer of the United States is sent away from his place of business as a witness for the Government, his necessary expenses, stated in items and sworn to, in going, returning, and attendance on the court, shall be audited and paid; but no mileage, or

*The following regulation is in force in the Interior Department:

DEPARTMENT OF THE INTERIOR,
Washington, October 31, 1883.

ORDERED: That whenever an attorney is charged with improper practices in prosecuting claims before the Pension Office the Commissioner of Pensions shall investigate the matter, giving such attorney due notice, together with a copy of the charges against him, that he may be heard in the premises. When the investigation shall have been concluded, the facts shall be reported to the Secretary of the Interior for consideration, together with the testimony upon which it is based, and the recommendation of the Commissioner. During the investigation into the conduct of an attorney for improper practices, he shall be recognized in claims before the bureau in his capacity as attorney, unless, for special reasons communicated to the Secretary of the Interior, he shall be suspended.

H. M. TELLER,
Secretary

other compensation in addition to his salary, shall in any case be allowed."

The act of March 3, 1883 (22 Stat., 563, sec. 4), provides:

"That hereafter it shall be the duty of the heads of the several Executive Departments, in the interest of the public service, to require of all clerks and other employees, of whatever grade or class, in their respective departments not less than seven hours of labor each day, except Sundays and days declared public holidays by law, or executive order: *Provided*, That the heads of the departments may by special order, stating the reason, further extend or limit the hours of service of any clerk or employee in their departments respectively, but in case of an extension it shall be without additional compensation, and all absence from the departments on the part of said clerks or other employees, in excess of such leave of absence as may be granted by the heads thereof, which shall not exceed thirty days in any one year, except in case of sickness, shall be without pay."

During the calendar year 1883, Matthew Gering was a clerk of class one in the Surgeon-General's Office, Department of War, with an annual salary of \$1,200 payable in monthly instalments. November 23, 1883, he was served by the Marshal of the District of Columbia with a summons, issued November 17, 1883, by the clerk of the United States district court in Dakota, to appear at Yankton as a witness "*for the Government*" in a cause in said court. The Secretary of War granted him a leave of absence without pay as clerk for twenty days from November 26, 1883, and he proceeded as a witness to Yankton.

On December 19, 1883, he, having been necessarily absent twenty days, was paid by the proper marshal "*his necessary expenses, * * ** in going, returning, and attendance" on said court, and returned. He had been previously absent for thirty days during said year by leave of the Secretary of War. December 26, 1883, he applied to the Secretary of War to change the order for leave of absence without pay to leave of absence with pay, on the ground that his leave of absence without pay was asked on the mistaken supposition that he was entitled to *fees as a witness and mileage* in said case. December 28, 1883, this application, to change said order, was referred by the Secretary of War to the First Comptroller "for decision" thereon.

DECISION BY WILLIAM LAWRENCE, *First Comptroller*.

Prior to the act of March 3, 1883 (22 Stat., 563, sec. 4), the head of an executive department could, on the application, and with the consent of a clerk therein, grant him a leave of absence for a fixed or indefinite time, with or without right to payment of salary (Bender's case, 1 Lawrence, Compt., Dec., 2d ed., 318; Eveleth's case, 2 *Id.*, 20; Leave of Absence case, *Id.*, 566). A usage had grown up, by which a leave of absence with pay was granted to a clerk for thirty days in every year, sometimes with ten days additional to attend the annual election at

the place of his residence, and, generally, resignations of clerks and employes were accepted to take effect in the future with a month's leave of absence, with pay. Under the law, at that time, clerks were entitled to salary during *all absences*, whether with or without cause; and the only remedy for absence without cause or permission was by removal from office (Sleigh's case, 9 Ct. Cl., 369).

The evils against which the act of March 3, 1883, was designed to provide, were (1) the absence of clerks and employes from their duties for more than thirty days in any one year with the consent of the head of the department and with right to salaries, and (2) the payment of salaries to clerks and employes absent without the authority of the head of the department.

If the act of March 3, 1883, stood alone, and should be construed *literally*, it would deny the right of the claimant to the payment of salary during his absence as a witness; for it declares that:—

“All absence from the departments on the part of said clerks or other employees, in excess of such leave of absence as may be granted by the heads thereof, which shall not exceed thirty days in any one year, except in case of sickness, shall be without pay.”

It is settled by usage, that the year mentioned is the *calendar year*; and the claimant was absent on leave thirty days during the calendar year 1883, before he was absent as a witness. The absence of a clerk under process as a witness “for the Government” in a case in court is not an evil, but a performance of duty required by law; and, hence, it is reasonable to infer that the statute was not designed to apply to such absence. This results from a well settled rule of construction, that “cases clearly not within the mischief intended to be remedied” by a statute are excepted from its operation (Bishop, Written Laws, 190 d). Besides, the act of March 3, 1883, is to be construed in connection with section 850 of the Revised Statutes, which, by inference, if not in clear terms, gives to a clerk absent “as a witness for the Government” a right “to his salary” while so absent. This section of the Revised Statutes *recognizes* the right to salary, and a right so recognized is in effect affirmatively secured (Otto's case, 3 Lawrence, Compt. Dec., 297; Bliss's case, *post*, citing Postmaster-General v. Early, 12 Wh., 148). The claimant did not lose his right to salary by reason of his absence “as a witness for the Government.” As his application for a leave of “absence without pay” was made under the belief, that he would receive the usual fees and mileage of witnesses (Rev. Stat., 848, 1883), the Secretary of War may very properly so modify the order for such leave of absence as to give it the effect of a leave with right to payment of salary. If it should be held, that the act of March 3, 1883, absolutely *prohibits* the head of a department from giving a clerk therein a leave of absence for more than thirty days in any one year, except in case of sickness, then the order made by the Secretary of War was void; yet the claimant is entitled to the payment of salary without any modification of such order.

But the proper construction of this act is, that the head of a department may, for reasons by him deemed sufficient, grant to a clerk or other employé therein a leave of absence without pay, and without limit as to time. The statute does say, that:

"All absence from the departments on the part of said clerks or other employees, in excess of such leave of absence as may be granted by the heads thereof, which shall not exceed thirty days in any one year, except in case of sickness, shall be without pay."

This simply means that no leave of absence *from duty with a right to pay* shall be granted in excess of thirty days, except in case of sickness. The statute deals *only* with cases of *absence from duty with pay*. The granting of *leaves of absence without pay* is not generally or necessarily an evil, and, hence, the statute was not designed to interfere with the power to grant such leaves. Any other construction would result in great inconvenience, if not lead to absurd consequences, and these should be avoided, if the words of a statute may be reasonably so interpreted (Bishop, Written Laws, 82, 90, 93, 200). Thus, a clerk, who had been absent for thirty days from a department, might be required by the process of a court to attend for a day, a week, or even months, as a witness in a suit between private parties, in which he would be paid *per diem* and mileage compensation. If the law does not permit a leave of absence in such case at all, the witness must either unlawfully disregard the process of a court, or, by obeying it, violate the law, which denies him an authorized or lawful absence. He would find himself in a position to exclaim—

"Which way I fly is hell."

So, the business of a department may be such, that for three months, more or less, in any year a large number of clerks may be without employment. If they cannot be, as the popular phrase is, "furloughed," or granted a leave of absence without pay, they must be retained and paid in idleness, or dismissed from the service, and in the latter case, their places must be supplied, when necessary, with new and inexperienced clerks under the Civil Service Act of January 16, 1883 (22 Stat., 403). And so, by reason of the sickness or death of relatives, and in other cases the impulses of humanity, social usages, and legitimate public sentiment may require the absence of a clerk or employé. It is almost incredible that Congress intended that there could be no lawful absence in any of these cases. The *argumentum ab inconvenienti* carries persuasive weight.

As the authority of the head of a department to grant a leave of absence without pay was unquestioned prior to the act of March 3, 1883, such authority is not to be deemed as taken away by this act, unless its terms clearly so require, and they do not. It does not in terms take away absolutely and entirely any power, but only limits *the* existing power, to grant a *leave of absence from duty with pay*. It does not, in terms or purpose, limit the power to grant a leave of absence without

pay. Nor does it profess to *repeal* the *prior law* giving a power to grant leaves of absence without pay, and there is nothing in it from which to infer a repeal by implication. Such power must continue to exist, unless it is clearly repealed; and it is not.

The Secretary of War will be advised that he may lawfully modify his order, so as to permit payment of salary to the claimant.*

TREASURY DEPARTMENT,

First Comptroller's Office, January 19, 1884.

IN THE MATTER OF THE AUTHORITY TO EMPLOY AND PAY A UNITED STATES DISTRICT ATTORNEY TO PERFORM SERVICES NOT REQUIRED OF HIM AS A PART OF HIS OFFICIAL DUTY.—BLISS'S CASE.

1. It is no part of the official duty of a United States district attorney to appear in a State court to attend to suits, although the United States may be directly interested therein, except in cases specially provided for, as in section 771 of the Revised Statutes.
2. The *proviso* to section 3 of the act of June 20, 1874 (18 Stat., 109), declares "that this [section] shall not be construed to prevent the employment and payment by the Department of Justice of district attorneys *as now allowed by law* for the performance of services not covered by their salaries or fees." There was in fact no law then existing which authorized the employment or payment of district attorneys "for the performance of services not covered by their salaries or fees," that is, for the performance of extra-official services. *Held*:
 - (1) This *proviso*, by recognizing the authority to employ and pay a district attorney for extra-official services, must be construed as a *grant* of such authority.
 - (2) The inhibitions of section 1765 of the Revised Statutes do not apply to payment for services rendered in performance of such employment.
 - (3) The authority so granted is limited to the employment and payment for services rendered in business or cases in which the United States is interested, and as to which no district attorney is charged with any official duty.
3. Section 299 of the Revised Statutes does not give authority to employ a district attorney to render extra-official services.

* Since this case was decided, the question has arisen, whether the Secretary of the Interior can, under the act of March 3, 1883 (22 Stat., 556, 563), detail a clerk in the Department of the Interior "to investigate fraudulent land-entries," and, during the time of his absence for a greater period than thirty days in any one year, pay his necessary expenses and also his salary as clerk. This act (22 Stat., 556) appropriates money "for the actual expenses of inspectors, while on duty, and of clerks detailed to investigate fraudulent land-entries, trespasses on the public lands, and cases of official misconduct." The same act (22 Stat., 563, sec. 4) provides, that "all absence from the departments on the part of * * * clerks * * *, in excess of * * *, thirty days in any one year, * * *, shall be without pay." The "absence" to which this act relates, is absence *not on duty*, or *from duty*. Such act does not interfere with the power of the head of a department to assign a clerk therein to make authorized investigations wherever required, or with the power to pay his necessary expenses and salary as clerk during absence *on the duty*. (Swamp-Land case, 2 Lawrence, Compt. Dec., 2d ed., 136.) The act of August 5, 1882 (22 Stat., 255, sec. 4), prohibits "all details of * * * officers, * * *, from places outside of the District of Columbia for duty within" said District. (Substitute case, 3 Lawrence, Compt. Dec., 345.) But there is no statute which prohibits generally all details of clerks in any department to make an authorized investigation elsewhere.

Payment of District Attorneys for Extra-Official Services—Bliss's Case. 39

Prior to the current fiscal year, the Attorney-General employed William H. Bliss, esq., the United States district attorney for the eastern district of Missouri, to render services in connection with suits known as the "Missouri Land Fraud Cases," brought in State courts in 'sundry States, against various persons, for forgery of land titles of Government lands in Missouri, in which cases the United States is interested, but is not a party of record.

March 31, 1884, the Attorney-General approved for payment an account for \$1,000 for services rendered by Mr. Bliss.

April 1, 1884, the First Auditor disallowed the claim "on account of the inhibition contained in section 1765 of the Revised Statutes."

The First Comptroller is now required to decide whether the claim can be paid.

DECISION BY WILLIAM LAWRENCE, *First Comptroller*.

The Revised Statutes contain the following provisions :

"SEC. 299. All accounts of the United States district attorneys for services rendered in cases instituted in the courts of the United States, or of any State, when the United States is interested, but is not a party of record, or in cases instituted against the officers of the United States, or their deputies, or duly appointed agents, for acts committed or omitted or suffered by them in the lawful discharge of their duties, shall be audited and allowed as in other cases, assimilating the fees, as near as may be, to those provided by law for similar services in cases in which the United States is a party.

"SEC. 363. The Attorney-General shall, whenever in his opinion the public interest requires it, employ and retain, in the name of the United States, such attorneys and counselors at law as he may think necessary to assist the district attorneys in the discharge of their duties, and shall stipulate with such assistant attorneys and counsel the amount of compensation, and shall have supervision of their conduct and proceedings.

"SEC. 364. Whenever the head of a Department or Bureau gives the Attorney-General due notice that the interests of the United States require the services of counsel upon the examination of witnesses touching any claim, or upon the legal investigation of any claim, pending in such Department or Bureau, the Attorney-General shall provide for such service.

"SEC. 365. No compensation shall hereafter be allowed to any person, besides the respective district attorneys and assistant district attorneys for services as an attorney or counselor to the United States, or to any branch or Department of the Government thereof, except in cases specially authorized by law, and then only on the certificate of the Attorney-General that such services were actually rendered, and that the same could not be performed by the Attorney-General, or Solicitor-General, or the officers of the Department of Justice, or by the district attorneys.

"SEC. 366. Every attorney or counselor who is specially retained, under the authority of the Department of Justice, to assist in the trial of any case in which the Government is interested, shall receive a commission from the head of such Department, as a special assistant to the Attorney-General, or to some one of the district-attorneys, as the nature of

the appointment may require; and shall take the oath required by law to be taken by the district attorneys, and shall be subject to all the liabilities imposed upon them by law.

"SEC. 367. The Solicitor-General, or any officer of the Department of Justice, may be sent by the Attorney-General to any State or district in the United States to attend to the interests of the United States in any suit pending in any of the courts of the United States, or in the courts of any State, or to attend to any other interest of the United States.

"SEC. 771. It shall be the duty of every district attorney to prosecute, in his district, all delinquents for crimes and offenses cognizable under the authority of the United States, and all civil actions in which the United States are concerned, and, unless otherwise instructed by the Secretary of the Treasury, to appear in behalf of the defendants in all suits or proceedings pending in his district against collectors, or other officers of the revenue, for any act done by them or for the recovery of any money exacted by or paid to such officers, and by them paid into the Treasury.

"SEC. 1765. No officer in any branch of the public service, or any other person whose salary, pay, or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation."

The act of June 20, 1874 (18 Stat., 101, 109), provides:

"And hereafter it shall be unlawful to allow or pay to any of the persons designated in this act any additional compensation from any source whatever, or to retain, detail, or employ in any branch of the War Department in the city of Washington any persons other than those herein authorized except in the Signal Office and the Engineer Corps, and except such commissioned officers as the Secretary of War may, from time to time, assign to special duties.

* * * * *

"SEC. 3. That no civil officer of the Government shall hereafter receive any compensation or perquisites, directly or indirectly, from the Treasury or property of the United States beyond his salary or compensation allowed by law: *Provided*, That this shall not be construed to prevent the employment and payment by the Department of Justice of district attorneys as now allowed by law for the performance of services not covered by their salaries or fees."

The services rendered by the claimant were not required of him by virtue of his office of district attorney, because they were not and could not be performed *in his district* (Russell's case, 12 Op. Att.-Gen., 284; Duskin's case, 16 *Id.*, 99). In addition to this, no law requires any district attorney to perform the services rendered by the claimant. A district attorney is not required to appear in a State court to attend to suits, although the United States may be directly interested therein, except in certain special cases which it is not now material to consider, as in the cases provided for in section 771 of the Revised Statutes. The duties of district attorneys are prescribed either directly or incidentally by provisions of the statute, none of which include the services rendered by the claimant (Rev. Stat., 380, 381, 767, 769, 770, 771, 824, 827, 831, 838, 856, 857, 1022, 1037, 1042, 1660, 1786, 1982, 1986, 1988,

2232, 3076, 3085, 3164, 3469, 3492, 3753, 4300, 4610, 4618, 4619, 4646, 4647, 5296, 5311; Duskin's case, 16 Op. Att.-Gen.; Durant's case, 5 *Id.*, 261; District Attorney's case, 10 *Id.*, 146; District Attorney's case, 11 Op., 433; Russell's case, 12 *Id.*, 288; Baldwin's case, 13 *Id.*, 580; Moise's case, 7 *Id.*, 84). As to the duty of the Government to defend its officers, see 9 Op. Att.-Gen., 51, 146. It necessarily follows that for any unofficial services rendered, as in this case, by the claimant, payment is not regulated, prescribed, or authorized by those provisions of the statutes which fix the salary and fees for official services required by law.

Assuming that the Attorney-General was authorized by law to employ the claimant, the right to compensation would not absolutely and necessarily follow as a mere *incident* of the employment (Meigs's case, 4 Lawrence, Compt. Dec., 588). No compensation can be paid unless some statute in terms, or by reasonable inference authorizes it (Goldsbrough v. United States, Taney C. C. Dec., 80; Crier-Bailiff case, *post*; Contempt case, *post*, and cases cited). But when the authority to employ the claimant is conceded, a reasonable construction would necessarily be given to any statute upon the subject of compensation so as to authorize payment. This would be so, because it is improbable that Congress would authorize an employment without providing for payment. Webb v. Baird, 6 Ind., 13. Assuming that the Attorney-General had power to employ the claimant, the authority to make payment is to be found in section 3 of the act of June 20, 1874 (18 Stat., 109), above quoted. The first clause of this section was suggested to Congress, because it was alleged that a public officer, whose duties were chiefly required to be performed in a Government building, occupied a part of it as a residence for his family. Its prohibition was, therefore, made more sweeping than even section 1765 of the Revised Statutes. But Congress in the *proviso* to this section assumed that the Attorney-General already had authority to employ district attorneys to perform services, the payment for which was not "covered by their salaries or fees," and that payment could be made for services under such employment. The purpose of the *proviso* was to retain in force the authority already given, or assumed to have been given, to employ and pay district attorneys to render services for which the law had provided no compensation. The proviso says "that *this* [section] shall not be construed to prevent [such] employment and payment." But if payment in such cases was *already* prohibited by section 1765 of the Revised Statutes, this *proviso* would have been unnecessary. To hold that it was thus prohibited would render the *proviso* unmeaning, nullify its purpose, assume that Congress enacted a vain and useless *proviso*, and was ignorant of the proper construction of section 1765. Effect must be given to the *proviso* by holding that its purpose was to sanction the payment of compensation in the cases in which it applies. This is required by the rule of construction *ut res magis valeat quam pereat* (Sedgwick, Stat., 2d. ed., 22d).

The construction mentioned is required by the rule, that when a statute recognizes an authority and a right, it is generally equivalent

to a legislative *grant* of such authority and right (Otto's case, 3 Lawrence, Compt. Dec., 303). Even if Congress was *mistaken* in *assuming* that some prior statute had authorized the employment and payment of any district attorney to perform services, which were not a part of his official duty, and not compensated by his salary or fees, still the effect of the recognition of such power is the same—it is equivalent to a grant of it. Such recognition could not, perhaps, imply a grant of power, if it operated to *repeal* any express statute or provision, but the recognition in this case works no repeal. It only supplements the power given by section 367 of the Revised Statutes. And this *proviso* evidently referred to, *recognized*, and so *authorized* an employment to render services which were not required as a part of the *official duties* of any district attorney. This must be so, because the salary and fees prescribed by law are full compensation for *all official services* prescribed and required by law (Meigs's case, 4 Lawrence, Compt. Dec., 588). The *proviso* to section 3 of the act of June 20, 1874 (18 Stat., 109), is in legal effect a legislative declaration of an existing authority to employ and pay district attorneys "for the performance of services not covered by their salaries or fees," or, in other words, for rendering *extra-official* services. This gives the authority *de novo*. A statute is simply a written declaration of the legislative will. Whatever the legislature wills in the form of a law, is law. The object of all construction is to ascertain the legislative will. The *proviso* now in question is a written declaration of the legislative will that the authority to employ and pay as therein mentioned *does exist*. This meaning, though it were but implied in the declaration, would be as much a part of the statute as what is expressed (Gelpcke v. City of Dubuque, 1 Wall., 220; United States v. Babbitt, 1 Black, 61). The meaning referred to, however, is more than implied in the *proviso*—it is therein *expressly declared* to exist, and, hence, *it is law giving the authority*.*

It is not intended to say that every *recognition* of the (1) *existence* or (2) *repeal* of a statute, when, in fact, no such statute exists, or no such repeal has been made, will have the effect to create a new law or repeal an old one. It is only when this recognition by the legislature *is a declaration of the legislative will*, that such existence or repeal of a statute will be recognized as new law. Thus in United States v. Claffin, 97 U. S., 548, a question was made whether section 2 of the act of March 3, 1823, (3 Stat. 781, ch. 58) was repealed. It was insisted that this section was repealed by the 4th section of the act of July 18, 1866, (14 Stat. 179). The Court say the Revised Statutes undoubtedly repealed the act of 1823, if it had not been repealed before. In section 5596 it was thus enacted :

All acts of Congress passed prior to said first day of December, 1873, any portion of which is embraced in any section of said revision, are hereby repealed, and the sec-

* Authorities on this subject may be found in a foot note at the end of this case, q. r.

tion applicable thereto shall be in force in lieu thereof; all parts of such acts not contained in such revision having been repealed or superseded by subsequent acts, or not being general or permanent in their nature.

"As a portion of the act of 1823 was carried into the Revised Statutes (see sec. 3099), and the second section was not, that section was covered by the repealing clause, unless it had been repealed before. But that clause indicates a belief on the part of Congress that it had been previously repealed, and, doubtless, that it was repealed by the act of 1866. The indication is found in the words that declare all parts of acts not contained in the revision, but other portions of which are, to have been repealed or superseded by subsequent acts. This, however, though entitled to great respect, ought not to be considered as more than an expression of opinion or a recital of belief. It is not in the form of an enactment. * It is not a declaration of congressional will. It is not a rule for the future. It certainly is not conclusive that the second section was repealed or superseded by the act of 1866, or by any other act prior to the enactment of the revision. Whether a statute was repealed by a later one is a judicial, not a legislative question. And even a declaratory act, or an act directing how a former act shall be construed, is inoperative on the past, though controlling in future. *Postmaster-General v. Early*, 12 Wheat. 136.

"It is, therefore, still a question of judicial construction whether the second section of the act of 1823 was in fact repealed by the act of 1866, that is, whether it was in conflict with that later act or supplied by it; for, as we have said, the act of 1866, while repealing expressly certain prior acts particularly described (the act of 1823 not being one of them), repealed only such other acts or parts of acts as were in conflict with it or were supplied by it."

The result is that if no other statute authorized the employment and payment of district attorneys to render services not required of them as part of their official duties, this *proviso* does authorize such employment and payment. It is a *special* provision applicable to a *particular class of cases*.

The inhibitions of section 1765 of the Revised Statutes do not apply to such payment, because (1) the *proviso* to section 3 of the act of June 20, 1874 (18 Stat., 109), *recognizes*, and so *grants* the right to such payment; (2) this construction is required by the rule of *ut res magis valeat, quam pereat*; and (3) by the rule that a *special provision* applicable to a *particular class of cases* is not controlled by general prohibitions, as those of section 1765, (*Huidekoper's case* (second), 3 Lawrence, Compt. Dec., 155).

Undoubtedly there are *limitations* on the power of the Attorney-General to employ district attorneys to render services not required of them by statute as a part of their official duties. These limitations are implied from the laws applicable to the Department of Justice (Rev. Stat., Title VIII). They arise from section 299 of the Revised Statutes. But the authority certainly extends to business, and to cases in which "the United States is interested but is not a party of record." (Rev. Stat., 299). This act of June 20, 1874 (18 Stat., 109, sec. 3), has been discussed more fully than it would otherwise have been, because it seems to be the only authority for the employment of the claimant in this case.

The public service by attorneys at law is provided for in different classes.

1. Section 363 of the Revised Statutes only authorizes the Attorney-General to employ attorneys "to assist the district attorneys in the discharge of their [official] duties." Here ample authority is given to provide aid to district attorneys in the performance of all official duties. Payment for their services is authorized, (Rev. Stat., 363, 365). They are to be commissioned (Rev. Stat., 366; Crowley's case, 3 Lawrence, Compt. Dec., 433; *Id.*, 355; 14 Op. Att. Gen., 408; See debates House Reps., April 30, 1866, Cong. Globe, Vol. 71, Part 3, 1st Sess., 39th Cong., 2296, &c.; District Attorneys' Assistants' case, 4 Lawrence, Compt. Dec., 113; See act February 26, 1853, 10 Stat., 162). Penalties are prescribed for taking, as compensation for any official duty, any sum not prescribed by law, (Rev. Stat., 5481).

2. Section 364 of the Revised Statutes requires the Attorney-General to provide such legal service as may be required by the head of a Department upon the examination of witnesses touching any claim. It seems, perhaps, that this service is to be rendered by existing officers of the Department of Justice, (Rev. Stat., 360).

3. Section 367 of the Revised Statutes is taken from the act of June 22, 1870 (16 Stat., 160), and makes provision which, at the time that act was passed, was deemed ample to provide the legal services requisite "to attend to the interests of the United States in any suit pending in any of the courts of the United States, or in the courts of any State, or to attend to any other interests of the United States", by requiring these duties to be performed by "the Solicitor-General, or any officer of the Department of Justice." While this remained unaffected by the act of June 20, 1874, (18 Stat., 109), it necessarily excluded the authority to employ a district attorney to render such services as those rendered by the claimant in this case.

a. It is a rule well settled that when a given service is expressly provided for, by officers specified, no other officer can be assigned to its performance, or employed or paid for that purpose. This section, 367, provides for services of the character now in question, to be rendered by officers other than district attorneys (Birch's case, 1 Lawrence, Compt. Dec., 2d ed., 154; Clerk's case, *Id.*, 305.)

b. The act of June 22, 1870, to establish the Department of Justice (16 Stat., 162), expressly prohibited payment of compensation in such cases as this. Its section 5 authorized the Attorney-General to send any officer of the Department of Justice from Washington to any State or district to attend to "any * * * interest of the United States," which clearly *embraces the service now in question*; its section 14 expressly declared that "no fees shall be allowed or paid to any other attorney or counselor at law for any service herein required of the officers of the Department of Justice." (16 Stat., 164, secs. 5 and 14; Rev. Stat., 361, 367). This expression "any attorney or counselor at law" clearly

includes district attorneys (Rev. Stat., 767; Dunnegan's case, 2 Lawrence, Compt. Dec., 2d ed., 95). And if it does not, district attorneys, in the absence of any special provision on the subject, would be excluded from the right to receive extra compensation by section 1765 of the Revised Statutes. All the prohibitions of the act of June 22, 1870, against the payment to other person "for any service * * * required of the officers of the Department of Justice" are carried into the Revised Statutes (secs. 361, 367). Hence, as the Revised Statutes stood prior to the act of June 20, 1874 (18 Stat., 109), there was no authority to employ or pay a district attorney for such services as those rendered by the claimant. One of the purposes of the act of June 22, 1870, was to *take away* the authority given by the act of February 26, 1853 (10 Stat., 161, 162, to every "head of a department" to employ attorneys to render services which no law required any district attorney to perform, and to provide for the performance of all such services by officers of the Department of Justice, and thus to cut off the prior practice of paying for extra official services rendered under employment of the head of a department (Opinions Attorneys General: Cushing, April 7, 1855, 7 Op. Att.-Gen., 85; Black, June 14, 1857, 9 *Id.*, 51; Black, May 25, 1858, *Id.*, 146; Stanbery, October 22, 1867, 12 *Id.*, 287; Devens, July 19, 1878, 16 *Id.*, 99; Cushing, February 23, 1855, 7 *Id.*, 53; Cushing, January 25, 1855, *Id.*, 46; Cushing, February 18, 1854, 6 *Id.*, 299; Johnson, November 13, 1849, 5 *Id.*, 172; Butler, March 7, 1836, 3 *Id.* 45; Crittenden, September 30, 1850, 5 *Id.*, 261; Wirt, July 31, 1820, 1 *Id.*, 385; Bristow, June 19, 1871, 13 *Id.*, 580).*

4. Section 366 of the Revised Statutes neither gives, nor recognizes any authority to employ an attorney to render services not being a part of the official duty of a district attorney. It provides that,

"Every attorney or counsellor at law, who is specially retained, * * * to assist in the trial of any case in which the Government is interested, shall receive a commission from the head of such Department [of Justice], as a special assistant to the Attorney-General, or to some one of the district attorneys, as the nature of the appointment may require; and shall take the oath required by law to be taken by the district attorneys, and shall be subject to all the liabilities imposed upon them by law."

* Debates in Congress cannot be consulted to ascertain the meaning of an act. If they could be, the debates on the bill "to establish the Department of Justice", which became the act of June 22, 1870 (16 Stat., 162), would throw some light on the subject. (See speech of Mr. Lawrence in House February 19, 1868, 79 vol. Cong. Globe, Part 2, 2d session 40th Cong. Globe, Part 4, 2d session 41st Cong., p. 3037; speech April 28, 1870, same volume p. 3065; District Attorneys' Assistants' case, 4 Lawrence, Compt. Dec., 115, note). The act establishing the Department of Justice was taken substantially from a bill introduced in the House by Mr. Lawrence. The debates on it show, however, that the powers of the First Comptroller were wholly misunderstood in some of the discussions. This fact illustrates the importance and justice of the rule that debates cannot generally be referred to for the purpose of giving construction to a statute.

Section 769 provides that, "every district attorney before entering upon his office, shall be sworn to a faithful execution thereof"—that is, faithfully to execute the duties of his office. Section 359 provides that, "the Attorney-General may, whenever he deems it for the interest of the United States, either in person conduct and argue any case in any court of the United States, in which the United States is interested, or may direct the Solicitor-General or any officer of the Department of Justice to do so." When, therefore, section 366 refers to a commission to an attorney as "a special assistant to the Attorney-General", it gives no authority to employ an attorney generally in all cases in which the Attorney-General may in person appear in a State court, or otherwise "attend to any other interest of the United States", in a matter constituting no part of the official duty of a district attorney. This must be manifest. Section 366 gives no authority to employ an attorney—it only declares that attorneys lawfully employed by virtue of other provisions, shall receive a commission in a specified form, &c. The Attorney-General is expressly authorized to go into any district and take charge of, and "in person conduct and argue any case in any court of the United States, in which the United States is interested." This may often be necessary or at least advisable in cases which are very important, or in which the district attorney, on account of any cause, cannot appear. When so engaged, the Attorney-General is in the performance of a duty which otherwise would be a part of the official duty of a district attorney. The Attorney-General, in such case, may require the assistance of another attorney. Having the authority to employ attorneys to assist district attorneys in their official duties, and to appear in such cases himself, he can, in any such case, employ another attorney and give him a commission "as a special assistant to the Attorney General." That such attorneys can, without the aid of the act of June 20, 1874, be employed only in those cases in which an attorney may be employed to assist a district attorney, must be manifest also from the fact that every attorney commissioned "as a special assistant to the Attorney General", * * * "shall take the oath required by law to be taken by the district attorneys, and shall be subject to all the liabilities imposed upon them by law." (Rev. Stat., 366). A district attorney only takes an oath to perform official duties of a district attorney. The attorney commissioned "as a special assistant to the Attorney General", takes the same oath. Thus, there is no authority to employ an attorney to perform duties which do not belong to the office of a district attorney except that which is derived from the *proviso* to the act of June 20, 1874.

District attorneys have been sometimes employed to assist in the argument of cases in the Supreme Court of the United States and have been paid for their services. Such employment and payment do not seem to have been authorized. Section 359 of the Revised Statutes made an adequate provision for this service (which was and is not any part of the official duty of a district attorney) by requiring that the

Attorney General and Solicitor General "*Shall* conduct and argue suits and writs of error, and appeals in the Supreme Court." This section does say as to this duty "except when the Attorney General in particular cases otherwise directs" which simply means as authorized in the next section, that "the Attorney General may require any solicitor or officer of the Department of Justice to perform any duty required of the Department or of any officer thereof." The question whether the act of June 20, 1874, authorizes the Attorney General to employ and pay a district attorney to render services in a case in which the United States is interested or a party in the Supreme Court is not now involved. It does authorize such employment and payment for services of a district attorney which are extra official, in any district not connected with the Supreme Court.

Prior to the act of June 22, 1870 (16 Stat. 162) heads of Departments were authorized to employ district attorneys to examine titles to real estate purchased for the government and to render other services (Speed, Attorney-General, March 8, 1866, 11 Op. Att.-Gen., 433; Cushing, Attorney General, January 25, 1855, 7 Op. Att.-Gen., 46). Some payments were made for services in examining titles which seem to have been unauthorized after this act (see act February 26, 1877, 19 Stat., 267; Rev. Stat., 355, 1136). The act of June 20, 1874, 18 Stat. 109, now sanctions payment for such services (See 16 Op. Att.-Gen., 99).*

5. The claimant does not derive any right to compensation from section 299 of the Revised Statutes. That section is taken from the act of August 16, 1856 (11 Stat., 50, sec. 12), and provides a mode of fixing the compensation of district attorneys in two classes of cases, (1) "for services rendered in cases instituted in the United States or State courts when the United States is a party in interest but not of record," and (2) "in cases instituted against officers of the United States, or their deputies, or duly appointed agents, for acts committed or omitted or suffered by them in the lawful discharge of their duties." It required accounts for services in these two classes of cases to "be audited and allowed as in other cases, assimilating the fees as near as may be, to those provided by [said act of February 26, 1853, 10 Stat., 161] for similar services." This act did not give authority to employ district attorneys to render services in such cases as the claimant's. It is not found in the title of the Revised Statutes relating to the Department of Justice. It is placed under the title relating to the Treasury Department. This may not be material (Rev. Stat., 5600). The authority to *employ* was found in that provision of the act of February 26, 1853 (10 Stat., 162), which authorized compensation "for the serv-

* The act of March 3, 1875 (18 Stat. 401) requires district attorneys to defend action against officers of either House of Congress.

The act of March 1, 1879 (20 Stat. 332 sec. 3) authorizes a fee of \$5 for the preparation and approval of deeds for property purchased by the United States "under the internal revenue laws, on sales for taxes, or under executions issued from the United States courts."

ices of counsel, rendered at the request of the head of a Department, such sum as may be stipulated or agreed on." The two classes of cases mentioned necessarily comprehended all, in which heads of Departments could employ counsel. The authority to employ was necessarily limited to services which it was not the official duty of any district attorney to render. The act of August 16, 1856 (11 Stat., 50, sec. 12), operated as such limitation, and it limited the discretionary power of heads of Departments to stipulate or agree upon the amount of compensation. The fact that statutes required of district attorneys specified official services excluded the authority of the head of a Department to employ an attorney to render the same services. While heads of Departments had authority to employ attorneys, including district attorneys, as stated, the mode of fixing compensation prescribed by the act of August 16, 1856 (11 Stat., 50, sec. 12, Rev. Stat., 299), was necessary and proper. It was proper as a limitation, or rather, as a change in the mode of fixing the amount of compensation prescribed by the act of 1853. When the act of June 22, 1870 (16 Stat., 163), established the Department of Justice, and took from heads of Departments the authority to employ counsel (except that the Attorney-General could do so in certain cases therein specified), and devolved duties of the character now in question upon officers of the Department of Justice (Rev. Stat., 367), the 12th section of the act of August 16, 1856 (11 Stat., 50; Rev. Stat., 299), had no practical operation as to such cases, and perhaps applied only to some of the cases mentioned in sections 771 and 827 of the Revised Statutes—that is, to suits against specified officers, &c. (Dunnegan's case, 2 Lawrence, Compt. Dec., 2d ed., 87). It could no longer apply to services of the character now in question. But it could apply to cases for such services which might thereafter be authorized by Congress. It was not repealed. It was a provision of a general character applicable not only in proper cases, if any, arising under existing laws, but also to such as might arise under statutes thereafter enacted. It was accordingly and properly carried into the Revised Statutes. And it does now apply to cases arising under the *proviso* to section 3 of the act of June 20, 1874 (18 Stat., 109). (See Devens, Atty. Gen. Op., July 19, 1878, 16 Op. Att. Gen., 99.)

The result is that the claimant is entitled to payment by force of the *proviso* to section 3 of the act of June 20, 1874.*

TREASURY DEPARTMENT,

First Comptroller's Office, April 4, 1884.

* The following discussion may throw some light on the foregoing case:

I. If there should be discovered any previous act which should seem to grant the privilege contained in the *proviso* to section 3 of the act of June 20, 1874 (18 Stat., 109), then that act containing said *proviso* would have to be regarded either—

(1.) As an act passed for the *express* purpose of making clear the meaning of such previous act, in which case it would be given effect, though not to any greater extent than its words required, for "a statute of explanation shall be construed only according to the words, and not with an equity or intentment, for there cannot be an explanation upon an explanation." (Butler and Baker's case, 3 Rep., 31 a; 3 Croke.

Car. 33; Hardcastle Statutes, 67; Johnson, Attorney-General, March 27, 1849, 5 Op. Att.-Gen., 83).

(2.) As an act explaining and making more clear the previous act, though not passed for that purpose: in which case it would have, as "parliamentary exposition", much weight as an argument in aid of attaching some certain meaning to the previous statute, though not *per se* conclusive upon the courts, who, and not the legislature, are the authorized expositors of the statute law of the land. (*Battersby v. Kirk*, 2 Bingh., N. C., 609; *Sandiman v. Breach*, 7 B. & C., 99; *Swift v. Jewsbury*, L. R., 9 Q. B. C., 312; *Rex v. Loxdale*, 1 Burr., 447; *Hardcastle, Statutes*, 67, 68; *Pike v. Megoun et al.*, 44 Mo., 499; *Constant v. The People*, 11 Wend., 513; *Henry v. Tilson*, 17 Vt., 479.)

II. But if, as seems to be undoubtedly the case, no such law whatever existed prior to the passage of said act, then it becomes necessary to construe the act of June 20, 1874, as belonging to that class of acts which are based upon a legislative misconception of the state of the law at the time of their passage.

These are of two kinds:

(1.) Those which contain (A) mere erroneous recitals of fact or law, or (B) which construe acts already existing in a manner opposed to general rules and judicial instincts or deliberate interpretation.

(2.) Those which, though based upon an erroneous assumption of the existence of some legal provision, are yet so clear in their exposition of the legislative will, that effect must be given to them, even by affirming the existence of the law from the date of the acts which proceed upon the assumption of its existence, though, in fact, such law did not at the time of their passage exist.

(1.) As regards the first: (A) It has been thoroughly settled that a mere recital in an act is not conclusive. This is so whether the recital be (a) a recital of fact, or (b) a recital of law.

(a) In *R. v. Haughton* (1 Ellis & Bl., 516; S. C., 22 L. J. M. C., 92), which was an indictment for non-repair of a highway against the inhabitants of the township of Haughton, a local act was relied upon by the defendants, which recited that the highway in question was in Denton. It was held, that the recital was not conclusive, and consequently did not open the estoppel. Lord Campbell, C. J., said, "Had there been anything amounting to an enactment that the road should be considered in Denton, this would have prevailed over the estoppel, but a mere recital in an act of Parliament, either of fact or law, is not conclusive; and we are at liberty to consider the fact or the law to be different from the statement in the recital." "It is not in the power of the legislature to bind individuals by a recital of facts in a statute." Such a recital "may, perhaps, be evidence where it relates to matters of a public nature." (*Cooley, Const. Lim.* [96], 4th ed., 117.)

(b) Recitals of law in which the legislature shows a misapprehension of the law on a particular subject, cannot have the effect of making that law which the legislature erroneously assumed it to be (*Earl of Shrewsbury v. Scott*, 29 L. J. C. P., 53; *ex parte Lloyd*, 1 Sim., N. S., 250; *Mitcalfe v. Hanson*, L. R., 1 H. L., 250; *Mersey Docks v. Cameron*, and *Jones v. Mersey Docks*, 11 H. L. Cases, 518; *Hardcastle, Statutory Law*, 243, 244; *Postmaster-General v. Early*, 12 Wheat., 148).

B. In discussing the construction of 8 Anne by 41 Geo. 3, c. 107, *Le Blanc, J.*, said in *Cambridge University v. Bryer* (16 East, 333), "This is not a positive interpretation of a former act imposed by the legislature in a subsequent act, but only by the provisions which the legislature have made, they seem to have apprehended that such was the construction of the statute of Anne. But if the court is clear that the construction is otherwise, that cannot bind us in the construction we are to put upon it."

"The legislature may declare the law by enactment, but they are not interpreters of the law, and courts of justice are not bound by a mistake of the legislature as to what the existing law is." This was decided in the court of King's bench in the case of *Dore v. Gray* (2 T. R., 365), and followed in *ex parte Lloyd* (1 Sim., N. S., 250, 251), in which it was held that, provisionally registered companies are not companies in the proper sense of the word, but mere associations of people, and that they are not to be considered companies because the legislature has spoken of them as such.

In *Bassett's case* (2 Ct. Cl., 449), it was held that an act which declared that a previous act, which was passed for the purpose of increasing the pay of army officers, should not be so construed as to increase the emoluments of the commissioned officers of the army at the date of its passage, should be considered *prospective*, and to take effect from its date. This decision was based upon the principle that it is the function of the court, and not of the legislature to construe acts.

It was held in *Calhoun v. McLendon* (42 Ga., 405), that as the court had interpreted the meaning of "head of a family," used in the provision of the Constitution of the state granting the right of homestead to certain classes of persons, the legislature, after such interpretation, could not by an act give a wider meaning to the expression, because that power is lodged in the judiciary.

The legislature of New York in 1853 passed an act in relation to the liability of

certain insurance companies to taxation, the construction of which was a question litigated and determined in the courts. In 1855, the legislature enacted a law declaring the intent of the act of 1853, to be different from the intent as declared by the courts.

It was held that "as an authoritative mandate in favor of the construction claimed by the insurance company, we cannot accord to it any force whatever. . . . The legislature has no judicial power; and cannot upon any pretence, interpose its authority respecting questions of interpretation depending in the courts. (*People v. Board of Supervisors*, 16 N. Y., 431; *Dash v. Van Kleeck*, 7 John. Cas., 477; *Ogden v. Blackledge*, 2 Cranch, 272; *Potter's Dwarria*, Stat. and Consts. 69, n; *Cooley*, Const. Lim., 94; the *Aurora Borealis v. Dobbie*, 17 Ohio, 127; *Salters v. Tobias*, 3 Paige, 338; *Planters' Bank v. Black*, 19 Miss., 43; *Gough v. Pratt*, 9 Md., 526.) *Thompson, J.*, in *Dash v. Van Kleeck*, *supra*, makes the distinction between legislative and judicial powers very clear: "To declare what the law is, or has been, is a judicial power; to declare what the law shall be, is legislative."

(2). But there may be acts recognizing so clearly a rule of law, that to deny it would abrogate the acts themselves. Such acts have been considered as granting the right of power which they assume previously existed. Thus it was held in *Norton v. Spooner* (9 Morris, P. C., 103, 128), that though an ordinance of British Guiana was adopted for the object of introducing and regulating jury trial, yet inasmuch as it recognized a certain cause of action, it would be monstrous to treat such cause of action as not existing, because not expressly granted by other acts.

Upon the effect of a statute assuming that to be the law which is not law, *Hardcastle* (Statutory Law, 244) has said "a rule of law may be sometimes found so distinctly recognized in a statutory enactment, that to deny the existence of the rule would be in fact to abrogate the statute." *Cooley* (Const. Lim., 5th ed., 113) has said: "It is always competent to change an existing law by a declaratory statute; and where the statute is only to operate upon future cases, it is no objection to its validity, that it assumes the law to have been in the past what it is now declared that it shall be in the future."

In reference to an act which declared that "the district court shall have cognizance concurrent with * * * the circuit courts of the United States" of certain suits, Chief Justice Marshall, in *Postmaster-General v. Early* (12 Wheat., 147), held, that the phrase "concurrent with the circuit courts of the United States," gave jurisdiction to the circuit courts, if it did not previously exist. He said, "The phrase may imply, that power was previously given to that other; but if, in fact, it had not been given, the words are capable of conveying it."

To the suggestion that the section of the act in question was not framed with the intention of vesting jurisdiction in the circuit courts, he replies, "It is true that the language of the section indicates the opinion that jurisdiction existed in the circuit courts rather than an intention to give it; and a mistaken opinion of the legislature concerning the law does not make law. But if this mistake is manifested in words competent to make the law in future, we know of no principle which can deny them this effect. The legislature may pass a declaratory act, which, though inoperative on the past, may act in future. The law expresses the sense of the legislature on the existing law, as plainly as a declaratory act, and expresses it in terms capable of conferring the jurisdiction." (See *Potter's Dwarria*, Stat. and Const., 70, n; *Cooley*, Const. Lim., 5th ed., 113; *Union Iron Co. v. Pierce*, 4 Biss, 327.) It is said in *State v. Miller* (23 Wis., 635), that "even though an unfounded assumption by the legislature that a particular jurisdiction existed, might not alone be sufficient to create it, yet where the jurisdiction is assumed to exist, and explicit provision made as to the form and mode of its exercise, the authority to proceed in that form and mode carries with it, by necessary implication, jurisdiction of the proceedings."

It has been said that, "an exception from a power proves its existence," (2 Story, Const., 4th ed., 1337; Const., Art. 1, sec. 9, cl. 1; see 14 Op. Att.-Gen., 420, Rev. Stat., 3618; 15 Op. Att.-Gen., 322; *Proceeds of sales case*, 3 Lawrence, Compt. Dec., 37; *Otto's case*, *Id.*, 296).

Where a statute declared that the charter of a city should be construed so as to give it full control over all ferries within its limits, this, although of no force as a construction of the charter, is a grant of the power, if that was not already possessed under the charter. (*Aiken v. Western R. R.*, 20 N. Y., 370; *Sedgwick*, Construc. of Stat. and Const. L., 2d ed., 227, n). A declaration of the legislature as to what they intended for the time in the past by a law, does not make the law what they intended it, if they are in error. It only affects it in the future; the past law is to be determined by the judiciary; but it is the duty of the courts to give to a construing act its intended practical operation, as far as is possible. (*Bassett's case*, 2 Ct. Cl., 44; *Salters v. Tobias*, 3 Paige, 338; *Potter's Dwarria*, Stat. and Const., 70, n.)

A declaratory statute is one which is passed in order to put an end to a doubt as to what is the common law, or the meaning of another statute, and which declares what it is and ever has been. Such a statute, therefore, is always in a certain sense re-

retrospective; because it assumes to determine what the law was before it was passed. (Bouv. Law Dict., "Statute;" Austin, Jurisprudence, Lec. 37; Cooley, Const. Lim., 5th ed., 111, 112.)

Retrospective laws are of three kinds:

First. Those touching crimes. These are void. (Const., Art. 1, sec. X, 1; *Kring v. Missouri*, 107 U. S., 221; Bishop, Statutory Crimes, 267, citing speech of William Lawrence, House Reps., January 4, 1861; Act of March 8, 1859—15 Stat., 340, c. 148.)

Second. Those touching civil rights. These, if they impair the obligation of contracts, are void. (Const., Art. I, Sec. X, 1.) In all cases they are objectionable, and acts touching civil rights are never retrospectively construed unless in pursuance of *express words*. (*Baughner v. Nelson*, 9 Gill., 299; *Elliott's Ex'r v. Lyell*, 3 Call., 279; *Com'th v. Hewet*, 2 Hen. & M., 181; *Gaskins v. Com'th*, 1 Call., 197; *Day v. Pickett*, 4 Munf., 109; *Satterlee v. Matthewson*, 2 Pet., 380; Bac. Abr. Stat. (C); *Drehman v. Stifle*, 8 Wall., 603; *Watson v. Mercer*, 8 Pet., 110; *Balt. & Susq'h. R. R. Co. v. Nesbit*, 10 How., 401, 402.)

Third. Those touching civil remedies. These are not only valid, but are comparatively free from objection, unless they materially affect the obligation of contracts, in which case, they are void. (*Bronson v. Kinzie*, 1 How., 311; *McCracken v. Haywood*, 2 *Id.*, 645; *Von Hoffman v. Quincy*, 4 Wall., 548; *Quackenbush v. Danks*, 1 Denio, 128.)

"An act of Parliament does not alter the law by merely betraying an erroneous opinion of it. For instance, the 7 Jac. 1, C. 12, which enacted that shop books should not be evidence above a year before action, did not make them evidence within the year; though the enactment was obviously passed under the impression, not improbably confirmed by the practice of the courts in those days, that they were admissible in evidence." Maxwell on Statutes, 376; *Dore v. Gray*, *per* Ashurst, J., 2 T. R., 358; *Ex parte Lloyd*, 1 Sim, N. S. 248, *per* Shadwell, V. C.; *Pitman v. Maddox*, 2 Salk., 690.

A passage in an act which showed that the legislature assumed that a certain kind of beer might be lawfully sold without a license, could not be treated as an enactment that such beer might be so sold, when the law imposed a penalty on every unlicensed person who sold beer. (Maxwell on Statutes, 377; *Read v. Storey*, 6 H. & N., 423; 30 L. J. M. C., 110; see 24 and 25 Vict., C. 21, §. 3.)

If the law be different from what the legislature supposed it to be, the implication arising from the statute, it has been said, cannot operate as a negation of its existence; and any legislation founded on such mistake has not the effect of making that law, which the legislature erroneously assumed to be so. (Maxwell, Statutes, 379, *per Cur.* in *Mollwo v. Court of Wards*, L. R., 4, P. C., 419, 437; and see *per* Cockburn, C. J., in *Shrewsbury v. Scott*, C. B., N. S. 1, 29 L. J., 53.)

A mere recital in an act whether of fact or of law is not conclusive, &c. (Maxwell, Statutes, 381; *R. v. Haughton*, 1, E. and B., 501; *R. v. Greene*, 6 A. and E.)

The 36 and 37 Vict., C. 60, §. 3, would hardly, by merely reciting that "an accessory after the fact" is "by English law liable to be punished as if he were principal offender," be understood as making so important a change of the law. Maxwell, Statutes, 381.)

(*Postmaster-General v. Early*, 12 Wheat., 148, cited in Maxwell, 381—who declares "if the mistake is manifested in words competent to make the law in future, there is no principle which can deny them this effect." Cites also *R. v. Oldham*, L. R., 32 B., 474.)

IN THE MATTER OF THE RIGHT OF AN ATTORNEY AT LAW, WHO IS NOT A DISTRICT ATTORNEY OF THE UNITED STATES, TO COMPENSATION FOR SERVICES RENDERED BY AUTHORITY OF THE ATTORNEY-GENERAL, IN A CASE IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA IN WHICH THE GOVERNMENT WAS INTERESTED, WHEN SUCH SERVICES DID NOT PERTAIN TO ANY OFFICIAL DUTY OF THE DISTRICT ATTORNEY.—ASSISTANT-ATTORNEY COYLE'S CASE.

1. Under section 363 of the Revised Statutes, the Attorney-General is authorized to employ any attorney at law to assist any district attorney in the discharge of his official duties.
2. Said section does not authorize the employment of an attorney at law who is not a district attorney to render a service for the United States which does not constitute any part of the official duty of a district attorney.
3. The *proviso* to section 3 of the act of June 20, 1874 (18 Stat., 109), authorizes the Attorney-General to employ any "*district attorney*" to render services for the United States which do not constitute any part of the official duty of a district attorney.
4. The power given by this *proviso*, being special, is to be pursued in strict compliance with the terms of the statute, and, hence, does not authorize the employment of any but a *district attorney*.

The act of June 11, 1878 (20 Stat., 106), authorizes the Commissioners of the District of Columbia to make contracts for paving streets in the District, and requires them to retain ten per centum of the cost thereof to be invested in United States or District of Columbia bonds to be held as a guarantee fund that the pavements shall be kept in repair for five years.

Under this act, the Commissioners made a contract with A. L. Barber & Co. for paving certain streets; they performed the work, and kept it in repair for five years. Ten per centum of the cost was invested in District of Columbia bonds in the name of A. U. Wyman, Treasurer of the United States, in trust for the contractors. In December, 1883, the contractors demanded the bonds, but the Commissioners of the District insisted that the bonds, being at a premium, should be sold, and from the proceeds ten per centum of the cost of the works paid to the contractors. January, 1884, Barber & Co. filed a petition in the Supreme Court of the District against the Commissioners, and A. U. Wyman, Treasurer, for a mandamus to compel the delivery of the bonds to the claimants. The case is entitled, *The United States on the relation of A. L. Barber and others v. A. U. Wyman, Treasurer, and others*. January 10, 1884, the Solicitor of the Treasury requested George B. Corkhill, esq., the attorney of the United States for the District of Columbia, "to do whatever is necessary to protect Mr. Wyman in his action as an officer of the United States performing duties required by law." A. S. Worthington, esq., who had been attorney for Barber & Co., succeeded Mr. Corkhill as district attorney. February 9, 1884, the Attor-

ney-General directed Randolph Coyle "to appear and represent the interests of the Government" in said mandamus proceeding. He performed the required service. April 2, 1884, the Supreme Court approved his account against the United States for \$75. April 4, 1884, the account was approved by the Attorney-General, and referred to the First Auditor, payment to be made from the appropriation for fees of attorneys. The Auditor disallowed the claim on the ground that—

"Section 907 of the Revised Statutes relating to the District of Columbia, limits the compensation to be paid to the assistants of the United States attorney, and that said assistants have already received the full amount of compensation allowed them under said section for the above month of February."

The section to which the Auditor refers provides, with respect to the United States district attorney, that—

"He shall pay to his deputies or assistants not exceeding, in all, four thousand dollars per annum * * * out of the fees of his office."

Pursuant to this enactment, his usage is to pay at the rate of \$2,000 a year to each of two assistants, one of whom is Mr. Coyle.

Randolph Coyle made an able oral argument, and submitted the following brief:

I. The account is disallowed by the 1st Auditor on the ground that section 907, Revised Statutes, District of Columbia, limits the amount of compensation which an assistant to the United States attorney for the District of Columbia may receive and that Mr. Coyle has received his full *pro rata* share of compensation as such assistant for the month of February, 1884, in which the above mentioned services were rendered and therefore cannot receive anything more from the United States.

This position is erroneous in two particulars:

1. The section referred to does not limit the amount of compensation which an assistant to the United States attorney may receive, it merely says that the United States attorney shall not pay his assistants more than \$4,000 per annum *out of the fees of his office*.

2. No reasonable interpretation of this section can limit the amount to [be] paid by the United States attorney to his assistants for any fractional part of the year provided he does not exceed the maximum amount allowed to be paid during the year.

This last consideration, however, is immaterial in the present case as the compensation asked does not come out of the fees of the office of the District Attorney. (District Attorney's Assistant's Case, 4 Lawrence, Compt. Dec., 115.)

II. The case is not affected by Sec. 1765, Revised Statutes, U. S., which provides that—

"No officer in any branch of the public service, or any other person whose salary, pay or emoluments are fixed by law or regulation shall receive any additional pay, extra allowance," * * * "except," &c.

It is obvious that the words "whose salary, pay or emoluments are fixed by law or regulation," qualify the words "officer in any branch of the public service" as well as the words "other person" and that the only "officers" who are prohibited from receiving "additional pay," &c., are those whose "salary, pay or emoluments" are so fixed.

Now, putting aside for the present, the question whether an assistant to the United States attorney for the District of Columbia is "an offi-

cer" at all, it is apparent that his "salary, pay or emoluments" are not "fixed by law or regulation," but are entirely dependent upon the contract which may be entered into between such assistant and the district attorney, and that therefore, if an "officer" at all, he is not such an officer as to fall within the prohibition of the statute. Neither is he a "person whose salary, pay or emoluments are fixed by law or regulation," but by *contract* between himself and his employer, the district attorney. (Reward Case, 2 Lawrence, Compt. Dec., 545.)

An assistant to the attorney of the United States is not "an officer" in any branch of the public service.

The Constitution (Art. II, Sec. 2) provides for the modes in which officers of the United States are to be appointed. For the most part the appointment is by the President, by and with the advice and consent of the Senate. "But the Congress may by law vest the appointment of such inferior officers, as they may think proper, in the President alone, in the courts of law, or in the heads of Departments," and the Supreme Court of the United States in the case of *The United States vs. Germaine* (99 U. S., 510) says "That all persons who can be said to hold an office under the Government were intended to be included within one or the other of these modes of appointment, there can be but little doubt"; and it was held that a surgeon appointed by the Commissioner of Pensions under Sec. 4777, R. S., U. S., was not an officer of the United States. The same reasoning would clearly apply to an assistant appointed by a district attorney.

When Richard Harrington, who was an assistant to the United States attorney at a compensation of \$2,500.00 per annum, was appointed secretary of the District of Columbia, under section 11, R. S., D. C., and presented his accounts for salary of that office it was objected that he could not be paid because he was already in receipt of the emoluments of another office amounting to \$2,500.00 per annum (Sec. 1763, R. S., U. S.), but after due consideration, it was determined by the then comptroller (Mr. Tayler) that the place of assistant to the U. S. attorney for this District was not "an office" within the meaning of the law.

The decision of the Comptroller in the Bliss case is to the effect that the *proviso* contained in the 3d section of the act of June 20, 1874 (18 Stat., 109), in effect contains a grant of power to employ and pay district attorneys for services not covered by their salaries or fee bills.

The letter to District Attorney Corkhill evidences a proper exercise of this power, and from the moment of its receipt it was one of the "duties" to the District Attorney to "protect" the Treasurer in the case referred; as much so as if the duty were imposed directly by statute instead of by executive authority exercised under a statutory grant of authority.

SEC. 363 Revised Statutes provides that, "The Attorney-General shall, whenever in his opinion the public interest requires it, employ and retain, in the name of the United States, such attorneys and counsellors at law as he may think necessary to assist the district attorneys in the discharge of their duties," &c., &c.

The Attorney-General, finding that the district attorney was disqualified from representing the Treasurer by reason of his previous relation to the case, directed me to assist him in the discharge of the duties of his office by assuming this particular duty, which I did.

Attorney-General Black, in 9 Opinions, 146, at a time when heads of Departments were authorized to employ counsel in the defense of officers of their Departments, held that, when district attorneys were employed in such case, it was competent to employ and pay assistants to aid them therein.

DECISION BY WILLIAM LAWRENCE, *First Comptroller.*

The question presented by the claimant in this case is substantially decided in the Bliss case (*ante*, 38). Under section 363 of the Revised Statutes, the Attorney-General is authorized to employ any attorney at law to assist district attorneys "in the discharge of their duties"—that is, in the discharge of *official duties*, required by law of district attorneys. The Attorney-General is not authorized to employ an attorney at law, who is not a district attorney, to render a service which does not pertain to or constitute a part of the official duty of a district attorney. There are many cases in which the Government is interested and should be represented by an attorney at law, but in which a district attorney is not, by virtue of his office, required to appear. The statute provides for service in such cases, by authorizing the Attorney-General to send the Solicitor-General, or any officer of the Department of Justice, to any district to attend to the interests of the United States in any suit pending in any court (Rev. Stat., 367). And this is supplemented by the *proviso* to section 3 of the act of June 20 1874, (18 Stat., 109), which authorizes the Attorney-General to employ "*district attorneys*" to render "services not covered by their salary or fees," that is, for unofficial services requisite to protect the interests of the Government. There can be no other mode of furnishing services not pertaining to the official duty of district attorneys, for two reasons:

First: Express provision is made for them as authorized in section 367 of the Revised Statutes, or by the employment of *district attorneys* under the *proviso* to section 3 of the act of June 20, 1874. And an express provision for a given service is equivalent to a denial of any other mode of procuring it (Reward Case, 2 Lawrence, Compt. Dec., 2d ed., 545; *Stacy v. Bank of Illinois*, 5 Ills., 91).

And second: The authority given to the Attorney-General is a *special statutory power*, and hence is to be strictly construed. It "must be pursued in strict compliance with the terms of the statute." (Bishop, *Written Laws*, 119, citing authorities; *Sedgwick Statutes*, 2d. ed., 76).

It is immaterial whether it was wise or otherwise for Congress to limit the authority to employ district attorneys. This is what the law has done. It may be that Congress merely assumed that such limitation would more certainly secure the services of faithful and skilled attorneys. The services rendered by the claimant did not pertain to the duties of the district attorney. No law required him to appear in the mandamus proceeding. This has been sufficiently shown in the Bliss case. The Attorney-General had authority to employ any *district attorney* to render the service now in question. He had no authority to employ any other attorney. Hence the claimant cannot be paid. On the construction now given to the statute, the claim cannot be paid. After the close of the current fiscal year, this construction will be adhered to. The usage, heretofore, has been to pay such claims. The

question is reserved for consideration and decision hereafter, whether the usage heretofore prevailing will be applied as to this claim.

TREASURY DEPARTMENT,

First Comptroller's Office, June 3, 1884.

IN THE MATTER OF THE RIGHT OF AN ATTORNEY AT LAW, WHO IS NOT A DISTRICT ATTORNEY, TO RECEIVE, WHEN ACTING UNDER AN APPOINTMENT OF THE ATTORNEY-GENERAL, COMPENSATION FOR SERVICES RENDERED UNDER THE ACT OF MARCH 3, 1875 (18 STAT., 506).—THOMAS'S CASE.

1. An attorney at law, who is not a district attorney of the United States, is not entitled to compensation for services rendered under the act of March 3, 1875 (18 Stat., 506), although employed to perform such services by the Attorney-General.

The account of O. B. Thomas, for the quarter ended March 31, 1884, for services as special assistant to the Attorney-General, to represent the interests of the United States in legal proceedings under the act of March 3, 1875 (18 Stat., 506), entitled, "An act to aid in the improvement of the Fox and Wisconsin Rivers in the State of Wisconsin," is now before this office for settlement. The said Thomas is an attorney at law but not a district attorney. The account is approved by the acting Attorney-General, but is not certified in the manner prescribed by section 365 of the Revised Statutes.

June 7, 1884, the Hon *Benjamin Harris Brewster*, Attorney-General, by letter, submitted a written argument to the First Comptroller, as follows:

* * * * *

The act of March 3, 1875, Ch. 166, directed "the Department of Justice" to "represent the interests of the United States in legal proceedings" thereunder, &c. Upon the 16th of April afterwards, my predecessor, Mr. Williams, accordingly appointed Charles P. Gill, esq., to be an Assistant Attorney-General, to represent the interests above mentioned. Upon Mr. Gill's resignation, Attorney-General Pierrepont (March 3, 1876), appointed R. L. D. Potter, esq., as his successor, and in turn upon the resignation of the latter, Attorney-General Devens (May 2, 1878), appointed Mr. Thomas. The last two commissions are substantially copies of that to Mr. Gill.

I am not informed of the reasons upon which Messrs. Williams, Pierrepont, and Devens acted in conferring the above commissions; and have examined the matter only since the receipt of your note.

I submit that, apart from the respect due to the official opinions and action of those distinguished gentlemen, as well as of their contemporaries, your own distinguished predecessors, a respect which no doubt you concede as readily as I, or any one—apart from these, I say, upon

giving the question thus by them decided that revision which in such cases now and then becomes necessary—it will appear to have been properly decided.

The act of 1875, required *this Department* to “represent” the litigation therein contemplated. There was something special in such express requirement, inasmuch as without it, the business would have fallen under the general provisions of law; provisions by which, in case the district attorney could not give it attention, an assistant, or special assistant district attorney, or Attorney-General would have been assigned thereto. I suppose that, inasmuch as district attorneys and their assistants are not members of the Department of Justice, the act of 1875 appeared to suggest that the Attorney-General should exercise his power of appointing (under Section 366, R. S.) *an assistant to himself*, who would, of course, be a member of such Department—and thereby fulfill the express provision that *the Department of Justice should represent, &c.* Presumably the litigation and other legal work in prospect was seen by Congress to be important, and therefore to require an officer who should have immediate relations with the Attorney-General. Such is the literal signification of the act. Very possibly it might have been construed to include as well the commissioning of an assistant district attorney,—under the argument that “represent” in the act, is satisfied by, *cause to be represented*. But the formal meaning is that which was adopted in practice, and properly adopted, as it seems. For there is no very substantial difference betwixt the two sorts of assistants mentioned in section 366; and it is plain that none of the regular staff of the Department of Justice could execute the duty in question. It follows that the hint given by the Statute was enough to decide Attorney-General Williams and his successors to select an *Assistant Attorney-General*, and that action, as I have said, seems to have been ratified by the consideration of the then Comptroller. Whether an Attorney-General shall nominate a *regular* or a *special* assistant district attorney, or a special Assistant Attorney-General to perform a particular service, which the regular district attorney and the regular staff of this Department cannot perform, is not of the essence.

* * * * *

So far as I can judge, Mr. Thomas is lawfully an Assistant Attorney-General, and as such entitled to the pay from time to time certified by this Department.

—

DECISION BY WILLIAM LAWRENCE, *First Comptroller*.

The act of March 3, 1875 (18 Stat., 506), is as follows :

“That whenever, in the prosecution and maintenance of the improvement of the Wisconsin and Fox Rivers in the State of Wisconsin, it becomes necessary or proper in the judgment of the Secretary of War to take possession of any lands, or the right of way over any lands, for canals and cut-offs, or to use any earth-quarries or other material lying adjacent or near to the line of said improvement and needful for its prosecution or maintenance, the officers in charge of said works may, in the name of the United States, take possession of and use the same after first having paid or secured to be paid the value thereof, which may have been ascertained in the mode provided by the laws of the State wherein such property lies. In case any lands or other property is now

or shall be flowed or injured by means of any part of the works of said improvement heretofore or hereafter constructed for which compensation is now or shall become legally owing, and in the opinion of the officer in charge it is not prudent that the dam or dams be lowered, the amount of such compensation may be ascertained in like manner. The Department of Justice shall represent the interests of the United States in legal proceedings under this act, and for flowage-damages herein before occasioned.

"SEC. 2. That a portion of the appropriation now made for the further prosecution of the improvement aforesaid, not exceeding in amount twenty-five thousand dollars, may be applied in payment for the property and rights taken and used as aforesaid."

The decision in Bliss's case (*ante*, 38), and in Coyle's case (*ante*, 52), is substantially in principle conclusive against the claim in this case. The act of March 3, 1875, declares that "the Department of Justice shall represent the interests of the United States in legal proceedings under this act." This, by a fair construction of its terms, seems to impose the duty required by it on such officers of the Department of Justice as the Attorney-General may designate—that is, on officers of the *Executive Department* of Justice at Washington. The services required by the act of March 3, 1875, did not pertain to the official duties of a district attorney. This officer is not required to attend to the interests of the United States in a State court. The services rendered were in a State court so far as they were in a court. If, therefore, the act of March 3, 1875, does not require the services to be performed under it, to be rendered by officers of the Executive Department of Justice, but authorizes the Attorney-General to employ a proper attorney at law for the purpose, the authority is controlled by the *proviso* to section 3 of the act of June 20, 1874 (18 Stat., 109), which limits the employment to a *district attorney*. All the statutes on the subject are in *pari materia*, and are to be construed together. The act of March 3, 1875, is not a *repeal* in any sense of the *proviso* mentioned, nor does it make an *exception* thereto. As a general rule, neither *repeals* nor *exceptions*, arising by implication, are favored.

The claim is disposed of in the same manner as that in the preceding case.

TREASURY DEPARTMENT,

First Comptroller's Office, June 9, 1884.

IN THE MATTER OF THE RIGHT OF THE OWNER OF AN EQUITABLE TITLE TO REALTY TO BE PAID THE SURPLUS PROCEEDS OF A TAX-SALE OF THE SAME, MADE UNDER THE DIRECT-TAX ACTS OF AUGUST 5, 1861 (12 STAT., 304), JUNE 7, 1862 (*Id.*, 422), MAY 9, 1872 (17 STAT., 89), JUNE 8, 1872 (*Id.*, 332), AND MARCH 3, 1883 (22 STAT., 595).—TAX-SALE-SURPLUS CASE.

In 1862, B. was the *legal* owner of a lot with improvements in Memphis, Tennessee, on which the sum of \$17.50 direct tax were assessed December 8, 1863, under the acts of August 5, 1861 (12 Stat., 304), and June 7, 1862 (*Id.*, 422); and, to pay said tax, the lot was sold June 21, 1864, to H., for \$600, which was paid into the Treasury, being \$566.80 in excess of "the tax, costs, charges, and commissions." December 22, 1865, B., in consideration of \$6,000, conveyed the lot with the usual covenants of warranty to A., to whom H., in consideration of \$925, quitclaimed said lot in March, 1873. June 9, 1877, A. applied to the Treasury Department for payment of said sum of \$566.80, alleging, that prior to June in 1862, B. *verbally* agreed to convey said lot to him, A., for \$6,000, to be paid on delivery of the conveyance, and gave him possession as such purchaser, but failed to execute such conveyance until December 22, 1865, as stated; which does not recite any prior verbal contract. B., whose residence is unknown, has no notice of this application, which is supported by affidavits. The act of August 5, 1861 (12 Stat., 304, sec. 36), provides that: "The surplus of the proceeds of the sale [in such case], after satisfying the tax, costs, charges, and commissions, shall be paid to the *owner* of the property, or his legal representatives."

Held:

1. That, inasmuch as B. is not *estopped* by any written or record evidence from asserting a claim for the surplus proceeds of said tax-sale, A., the claimant, not having the *legal* title to said lot *at the time of the sale*, and so not the *legal* title to the claim now made, is not entitled to said surplus proceeds; accounting officers not generally recognizing claimants, whose rights exist only in equity and not at law.
2. That accounting officers will give effect to *recitals* in written instruments, and to *estoppels* when they operate *per se* to transfer the *legal* title to a claim by operation of law, and are evidenced by conclusive matter of record or by writings, which have the *legal* effect to transfer title.
3. But that such officers cannot generally give effect to disputable allegations of fact, from which, when judicially ascertained, an *estoppel in pais* might arise.
4. That the claimant does not, on the facts stated, present a case, which *in equity* gives him a right to payment, even if such case could be considered by accounting officers.
5. That a statute applies to cases clearly within its spirit and purpose although not within its letter, but does not apply to cases within its letter, when clearly not within its spirit and purpose.
6. That, where a new right, or the means of acquiring it, is given by statute, and the means also of enforcing it is therein prescribed, parties claiming thereunder are confined to the statutory mode of redress.
7. That no appeal lies from the decision of the First Comptroller to the Secretary of the Treasury, on the rejection by the Comptroller of a claim for surplus proceeds of a direct-tax-sale.

The act of August 5, 1861 (12 Stat., 294, sec. 8), laid a direct tax upon the several States and Territories, and District of Columbia, and (*Id.*, 304, sec. 36) authorized public officers to collect it by public sales of

"so much of the * * * [real] property" subject to such tax as might be necessary. This act (*Id.*) then provides, that:—

"The surplus of the proceeds of the sale, after satisfying the tax, costs, charges, and commissions, shall be paid to the *owner of the property*, or *his legal representatives*, or if he or they cannot be found, or refuse to receive the same, then such surplus shall be deposited in the Treasury of the United States, to be there held *for the use of the owner or his legal representatives*, until *he or they* shall make application therefor to the Secretary of the Treasury, who, upon such application, shall, by warrant on the Treasury, cause the same to be paid to the applicant."

The act of June 7, 1862 (12 Stat., 422), makes provisions to execute the former act. The act of March 3, 1883 (22 Stat., 595), provides, that:—

"The Secretary of the Treasury is hereby authorized and directed to cause to be audited by the proper accounting officers of the Treasury and paid the claims of the *original owners of lands which were sold for non-payment of United States direct taxes*, for the surplus proceeds of the same, under the provisions of the act of August fifth, eighteen hundred and sixty-one, and for such purpose the sum of one hundred and ninety thousand dollars, or so much thereof as may be necessary, is hereby appropriated."

In 1862, Euclid Borland was the legal owner in fee of the north 23 feet of lot four, block 19, in the city of Memphis, Tennessee, with a valuable building thereon, producing rents and profits. December 3, 1863, a direct tax was, under the act of June 7, 1862 (12 Stat., 422), assessed against said real estate to the amount of \$17.50; and notice was given by publication, that the direct-tax commissioners were ready to receive payment. By force of section 2 of this act, and of the President's proclamation of July 1, 1862 (12 Stat., 1266), the tax became a lien on real estate at said last-named date. June 21, 1864, at a direct-tax sale by virtue of said act, said real estate was sold to Ruel Hough for \$600, which sum was deposited in the Treasury. December 22, 1865, Borland, by deed, "in consideration of \$6,000, in hand paid" by Matthias App, did "give, grant, bargain, sell, and convey" to him said real estate in fee-simple, and did covenant that the grantor "*is well seized*

* * * of the premises * * * in fee-simple and has good right-ful power * * * to convey the same, and that the same is free from all incumbrances * * * , grants, sales, liens, taxes, charges, and assignments, and to warrant and defend * * * against all persons claiming."

Then there is added: "But the above warranty is only to extend to the refunding of the above purchase money and interest, should the title fail, and no further."

March, 1873, Hough, by deed, in consideration of \$925, paid by App, quit-claimed said premises in fee-simple to App. January 28, 1874, App conveyed the premises with warranty to J. T. Brady.

June 9, 1877, App made a sworn statement, which was filed in the Treasury Department August 25, 1882; and he made and filed another

sworn statement June 26, 1883, corroborated in some respects by an affidavit of another person—all tending to prove, that in 1862, and prior to June, one O'Neil represented himself to App as agent of Borland, then in New Orleans, but without any written evidence of authority, when it was mutually agreed that Borland would sell and convey said real estate to App for \$6,000, to be paid on delivery of the deed, and that App should, as he did then, take and continue possession of this real estate, receiving the profits thereof and paying local taxes; but that nothing was heard from Borland until in 1865, when the latter asked App if he was still willing to carry out said contract, and, App assenting, Borland made the deed of December 22, 1865, and received the consideration, \$6,000. In the statement filed August 25, 1882, App asked the Secretary of the Treasury to refund to him, App, the surplus proceeds of the direct-tax sale. The deed from Borland to App does not recite any prior contract. Borland, whose residence is unknown, has no notice of the pending of this claim.

Hon. Charles Chesley, Solicitor of Internal Revenue, in a learned opinion, advised the Commissioner of Internal Revenue "that the claim should be allowed." From which opinion the following extract is taken:—

"The Tennessee statute of frauds, concerning contracts for the sale of lands is as follows:

'No action shall be brought * * * upon any contract for the sale of lands, tenements, or hereditaments, or the making of any lease thereof for a longer term than one year, * * * unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorized.'

This is essentially the same as the English statute upon which the statutes of frauds in force in most of the States in this country are based.

The rulings of the English chancery courts, that a part performance of a parol contract for the sale of lands may take the case out of the statute of frauds, are followed by the United States Supreme Court and by chancery courts of most of the States, and specific performance of such a contract is ordinarily decreed by them where the purchaser has entered into possession under the agreement, with the knowledge and assent of the vendor, with a clear and unequivocal reference to the agreement and with a view of its performance, and has made improvements upon the property on faith of the promised conveyance, or, on that faith, has done some other act or incurred some other obligation in respect to it, such as having leased it to other parties, or has devoted it to some special use, which part performance would work a loss and a fraud upon him unless the agreement is carried into complete execution.

A parol contract for the sale of land is not void. It is simply voidable. The vendor may avoid it by setting up the statute of frauds. But he is at liberty to waive his rights to that defense and consummate his agreement, and, unless he insists upon the defense, a court of chancery will compel him to comply with the terms of his contract, even though there has been no part performance.

The Supreme Court of Tennessee, however, has refused to follow the English rule, and holds that equity cannot except cases out of the

statute which are embraced by its words, if the statute is pleaded in defence. (*Sheid v. Stamps*, 2 Sneed, 172; *Patton v. McClure*, Mart. & Y., 333; *Pepkin v. Jones*, 1 Humph., 325; *Ridley v. McNairy*, 2 *Id* 174).

App, therefore, could not have enforced specific performance through the Tennessee courts, if Borland had set up the statute in defence. Possibly he might have enforced it in some other State, if at any time the courts of another State had obtained jurisdiction of both himself and Borland. When a court of equity has jurisdiction of the parties, it may, in its discretion, compel him in whom the title is vested to convey lands lying beyond its jurisdiction, and may enforce the conveyance by attachment for contempt; but in such a case it is the act of the party and not the decree of the court that affects the title. The decree is not *in rem* but *in personam*. But whether the court in a State where the English rule prevails, having jurisdiction of both App and Borland, would, against a plea of the statute, have entered a decree requiring Borland to convey, is extremely doubtful, in view of the rulings of the court of Tennessee where the lands lie and where the contract itself was entered into. Application to a court of equity to decree the specific performance of contracts are addressed to its sound and reasonable discretion. Such relief is not a matter of absolute right. It is a matter resting in the discretion of the court to be exercised upon a consideration of all the circumstances of each particular case.

The probabilities that App could ever have enforced specific performance of the contract against a plea of the statute seem too remote to sustain his claim of having been the owner of the land at the time of the tax-sale. Unless, therefore, his other position can be maintained, his claim should probably be rejected.

The claimant's second point, and the one on which he chiefly relies, is, that the deed given by Borland in 1865 related back to the date of the parol contract and made App owner of the land on and after that date.

A party that enters into a valid parol contract for the purchase of lands becomes at once the equitable owner. The vendor becomes the trustee of the vendee and stands seized of the property for his benefit. The equitable estate of the vendee is alienable, descendable, and devisable, in like manner as real estate held by a legal title, and he is owner of the property with reference to all benefits and losses (2 Story, Eq. Jur., §§ 789-790; *Lewis v. Hawkins*, 23 Wall., 119).

A parol contract for the sale of real estate is a valid one unless, and until one of the parties sets up the statute of frauds. The right to plead the statute is a privilege personal to the parties to the agreement. A stranger cannot plead it. If the parties do not insist upon the defense, a court of equity will decree specific performance (2 Story, Eq. Jur., § 755; *Crawford v. Woods*, 6 Bush, 200; *Harrison v. Johnson*, 3 Metc., Ky., 583; *Flagg v. Mann*, 2 Sumner, 528, and authorities there cited).

A deed given by one in consummation of his parol contract for the sale of lands, as against himself and his heirs, relates back to the date of his contract (2 Story, Eq. Jur., § 75; *Minns v. Morse et als.*, 15 Ohio, 568; *Clary's heirs v. Marshall's heirs*, 5 B. Monroe, 269, *et seq.*). In this last case the court says:

'It has been repeatedly determined by this court, that a parol contract for the sale or lease of land for a longer term than a year is not void. The statute withholds the right of action to enforce such contract, but allows its operative effect as a shield of defense, and if subsequently perfected by deed, such deed will have relation back to the original of the parol contract, so as to overreach an intermediate executory sale to a stranger.

The vendor may avoid it by pleading or relying upon the statute; yet he is left at liberty to waive his right to defense and consummate the contract, and cannot be deprived of his election to do so by a stranger. Though a vendor is not *legally* bound to fulfill his contract by a conveyance, yet a *moral duty* rests upon him to convey, and a *moral right* in the vendee to ask a conveyance; and if the former chooses to waive his *legal* right, in the obedience to the dictates of his moral duty, by conveying or furnishing *written* evidence of his obligation to convey, a stranger to the contract has no right to complain, nor to preclude him from this discharge of his moral duty, in whole or in part, upon the terms of the original parol contract, or upon terms which he may choose to exact, and which the vendee or sub-purchaser may be willing to concede.'

In *Minns v. Morse et als.*, in which the question seems to have been whether the sale under a levy on an execution should be confirmed, it was held, on a similar course of reasoning, that a conveyance of land made in consummation of the grantor's prior parol agreement cannot be defeated by a judgment rendered after the making of a contract, but before the execution of the conveyance.

In announcing its decision the court, speaking of the parties that had made the parol agreement and given the deed, said:

'In such cases the parol contract is the basis of the decree, as it is also in all instances where part performance takes the contract out of the operation of the statute. Hence it would seem to follow that the parol contract to convey was voidable only and was binding upon the conscience; and if admitted and affirmed in answer would and must have been enforced by decree against Clark and Wiley at the date of respondent's judgment. They, therefore, in procuring the conveyance, only did voluntarily what a court of equity upon their own confession would have forced from them. *Shall the act thus done in good faith, in performance of a moral duty arising from an express agreement, when executed, be less efficient than a judicial decree?*

As soon as the parol contract was made Borland commenced holding the legal title as trustee of App, and continued so to hold it until his conveyance in 1865. App was, therefore, the equitable owner of the property at the time of its sale for taxes. The conveyance terminated the trust and the legal title to the land thereupon vested in App.

If a chancery court having jurisdiction of the property and of the parties, had prior to the conveyance entered a decree for a specific performance of the parol contract, *that decree would unquestionably have related back to the date of the contract, and would have made App the legal owner of the land from that date, and would also have entitled him to all the rights and benefits which had grown out of it during the life of the trust.* Instead of compelling App to resort to the courts for the enforcement of his rights, Borland voluntarily gave him a deed of the land, regardless of his privilege under the statute, and gave it, as stated by himself at the time, with reference to and in consummation of his own prior parol contract. *The deed contains no recital of this last-named fact, it is true.* Neither, so far as it appears, did the deed in the *Minns'* case. The testimony of App upon that point is clear and positive, and is corroborated by all the other facts and circumstances.

I am convinced from the evidence in the case that in 1862 Borland entered into a parol contract with App to convey to him the land in question for six thousand dollars, to be paid on delivery of the deed; that in 1865 Borland gave him a deed of the property, and App paid him the stipulated consideration above named, and that the deed was given voluntarily, in pursuance of the said agreement of 1862 and in consummation of it.

The owner of lands sold for direct taxes under the act of June 7, 1862, is entitled to the surplus of the proceeds of the sale after satisfying the tax, costs, charges, and commissions (*United States v. Taylor*, 104 U. S., 216), and his right to apply for and receive it under the provisions of section 36 of the act of August 5, 1861, is neither destroyed, transferred or in any way affected by his purchase of the tax-title and

subsequent sale of the property. As soon as the surplus was deposited there arose a right on his part to apply for and receive it. This right is not one which runs with the land. Nor can it be so assigned as to give an assignee any legal interest in the claim (*Spofford v. Kirk*, 97 U. S., 484).

I am of the opinion that the claim should be allowed."

In another part of his opinion, the Solicitor of Internal Revenue, referring to several allowed claims, says:

"It has never been supposed or claimed, so far as I am aware, that the Secretary of the Treasury has full equity powers. But it has been supposed that he may have some regard to the justice and right of a case, even though in so doing he is not disposing of it precisely as a court of law would feel constrained to do, and that so far as he is able, he will avoid lending aid and countenance to the perpetration of a wrong. In the exercise of such supposed quasi-equitable powers money has frequently been paid to the merely equitable claimants."

November 2, 1883, the Commissioner of Internal Revenue, by letter to the Secretary of the Treasury, recommended that the claim be approved in favor of App for \$566.80, being "the surplus of the proceeds of the [direct-tax] sale [of the lot], after satisfying the tax, costs, charges, and commissions." November 6, 1883, this letter was, by the Acting Secretary of the Treasury, referred to the Fifth Auditor for his examination and action thereon. November 12, 1883, the Fifth Auditor, by report, No. 36,904, allowed the claim in favor of App for \$566.80, and reported said balance to the First Comptroller "for his decision thereon."

A. L. Merriman, attorney for the claimant, submitted a brief in his behalf, as follows:

"The word, 'owner,' in section 36 of the act of August 5, 1861, is used without any qualifying or restrictive words, and should be construed by the Comptroller, as it would be by a court, to include the party having the equitable title. 'In equity * * * a vendee of real property by executory contract becomes the owner with reference to all benefits and losses, and the vendor holds in trust for him.' (1 Hilliard, Contracts, 50.) At the time of the direct tax-sale App held the lot in question as vendee under an executory contract, and thereby as *cestui que trust* became the 'owner.'

The ancient rigid line between legal and equitable rights has been greatly modified in its legal bearings, both as to personal and real property. Thus, a mortgage, which was formerly to pass the legal title to the mortgagee, is now held to pass only an equitable. So, with covenants running with the land, the grantee of the land acquires in the nature of an equitable assignment a right to demand and sue upon breach of the covenant in his own name. It was held in Pennsylvania, in ejectment, that a *cestui que trust* could recover in his own name, the court saying: 'We have no Court of Equity here; and, therefore, unless the *cestui que trust* could bring an ejectment in his own name, he would be without remedy, in the case of an obstinate trustee.' (*Kennedy v. Fury*, 1 Dallas, 76; Washburn, Real Property, Book 2, ch. 3, section 4, paragraphs 16, 29, 32; *Hopkins v. Ward*, 6 Munford, 38; *Cary v. Marshal*, 1 B. Monroe, 266). The direct tax-act provides, that the surplus proceeds of sales 'shall be paid to the owner of the property,' and, in the event of not being

so paid, shall be deposited in the Treasury, 'to be there held for the use of the owner.' This presupposes that the applicant shall establish his right to such proceeds. The entire proceeding is of a quasi judicial character, and must determine all questions of ownership in the same manner as a court of equity."

DECISION BY WILLIAM LAWRENCE, *First Comptroller*.

Under the acts of August 5, 1861 (12 Stat., 294), and June 7, 1862 (*Id.*, 422), a direct tax of \$17.50 became a lien July 1, 1862, on a lot in Memphis, Tennessee, of which, as shown by the proper record of titles, Euclid Borland had the legal title, and so continued to have until December 22, 1865, when he conveyed it to Matthias App. By virtue of these acts said lot was sold at a direct tax-sale June 21, 1864, to Ruel Hough for \$600, which was duly deposited in the Treasury, being \$566.80 in excess of "the tax, costs, charges, and commissions." The act of August 5, 1861 (12 Stat., 304, sec. 36), expressly requires, that "the surplus of the proceeds of the sale, after satisfying the tax, costs, charges, and commissions,"—being said sum of \$566.80—"shall be paid to the owner of the property, or his legal representatives." The act of March 3, 1883 (22 Stat., 595), enforces the obligation substantially in the same words, by requiring to be paid "the claims of the *original owners* of lands which were sold for non-payment of United States direct taxes." It is clear, that no payment can lawfully be made to the claimant, App.

I. The "owner" entitled to payment is, in the absence of any estoppel, the party having the *legal title* to the lot at the time of the direct tax-sale. The equivalent expressions of the statutes—"owner of the property"—"original owners of lands"—apply in this case only to Borland, who at the time of the tax-sale was such owner, and hence has the *legal title* to the claim in this case. It has been sufficiently shown elsewhere, that, as a general rule, the Comptroller can only recognize the party having the *legal title* to a claim; and it is unnecessary here, to repeat the reasoning or cite the authorities for this (*Indorsement case*, 4 Lawrence, Compt. Dec., 457; 3 Lawrence, Compt. Dec., Introduction, XL).

The right asserted in this case is not *at law*, but is *in equity*; because Borland's conveyance, under which such right is asserted, does not *per se relate back*, and so did not make App the legal owner of the lot in question prior to, or at, the time of the tax-sale. This effect can only be given to the conveyance by a decree in equity reforming the same to make it so operative, if on evidence the proper court finds, that such was the intention of the parties to said conveyance, and that by mutual mistake they failed to express this intention therein.

A Court of Equity may give effect to a conveyance by *relation* (*Cheney v. Woodruff*, 45 N. Y., 101; *Hathaway v. Payne*, 34 N. Y., 103; *Jackson v. Ellis*, 13 Johns., N. Y., 119).

So effect may sometimes be given accordingly in courts of law. *Id.*

But under the statutes relating to tax sales in this particular class of cases, the Comptroller has no power to decide such question, which is *adversary* and judicial, and only to be determined by "due process of law" in a judicial proceeding.

The claimant asks that he shall be *adjudged* by the Comptroller the *equitable owner* of the lot in question at the time of its tax-sale, and, hence, that Borland shall be *divested* of his *legal title* to the claim for surplus proceeds of sale. The decision of the Comptroller on a claim, over which the law gives him jurisdiction, and which a claimant has submitted to him, is "due process of law" within the meaning of the Constitution, and is final and conclusive for all purposes of executive administration (Rev. Stat., 191; *Springer v. United States*, 102 U. S., 594; *Murray's Lessee et al. v. Hoboken Land and Improvement Co.*, 18 How., 274; *De Treville v. Smalls*, 98 U. S., 517; *Sherry v. McKinley*, 99 U. S., 496; *Miller v. United States*, 11 Wall., 268; *Tyler v. Defrees, Id.*, 331). The *legal title* to this claim, if in any one, is in Borland. He cannot be deprived of this, except (1) by "due process of law" (Const. of the U. S., Amendments, Art. V), or (2) by his consent (*Keyser's Case*, 4 Lawrence, Compt. Dec., 321). A decision now against Borland, without notice to him, and without an opportunity to be heard, would not be "due process of law" (*Sallu's Case*, 1 Lawrence, Compt. Dec., 2d ed., 223; *Reeside's Appeal*, 4 Lawrence, Compt. Dec., 179). And the inquiry, whether App, before the tax-sale acquired the *equitable title* to the lot in question, and so to the claim made in this case, is essentially a *judicial one*, the determination of which belongs to the proper court, and not to *executive officers*. That such inquiry is a question of *judicial equity—jurisdiction*, no lawyer will dispute. That the same question can at the same time be subjected to a conflicting executive-jurisdiction, seems improbable, if not impossible, under a constitution like ours, which makes executive and judicial authority separate, distinct, and independent. If App can now assert an equity commencing in 1862, and this should be so determined by executive officers, Borland could still go into a *court* of equity, which might decide the same question differently. If App can assert an equitable right before executive officers at all, he can do so, even if Borland had made no conveyance to him. And after App should be paid his claim, based on that view, Borland could, in such case, maintain ejectment for his lot, or defeat a bill in equity by App for specific performance, and then demand payment of the same amount of money now claimed in this case. Thus, it is manifest, that the question of an equity, commencing in 1862, or arising from any fact occurring since, cannot now be considered. The proper course for executive officers to pursue in stated (3 Lawrence, Compt. Dec., Introduction, xxxiv, xxxvii, xxxix, this case has been elsewhere pointed out, and need not be here re-
XL; *Keyser's Case*, 4 Lawrence, Compt. Dec., 299, 304). The law has

provided them with no adequate means of passing on questions of equitable title; and, hence, it may reasonably be inferred, that the power to do so, in the form in which the question now arises, does not exist. It may be said, that Borland has been divested of his right to this claim by *his own consent* in making and *ratifying* a verbal sale of the lot in question. It has already been shown, that this is a judicial question of equity jurisdiction; and no statute has given the Comptroller authority to decide such question as against a party in interest, who has not submitted his claim for decision.

The status of the claimant here in this respect is the same that it would be if he were suing in the Court of Claims; for that Court has jurisdiction of actions to recover surplus proceeds of direct-tax sales (*United States v. Taylor*, 104 U. S., 216; s. c. 14 Ct. Cl., 339). The statute gives the Court of Claims jurisdiction of "all *claims* founded upon any law of Congress, * * * , or upon any contract, expressed or implied, with the Government of the United States" (Rev. Stat., 1059). The jurisdiction of accounting officers extends to "all claims and demands whatever by the United States or against them [it]" (Rev. Stat., 236). It has been determined, that the expression, "all claims," as applied to the Court of Claims, gives jurisdiction of claims *at law*, but no *equity jurisdiction* (*Bonner v. United States*, 9 Wall., 159; *United States v. Gillis*, 95 U. S., 412; *Indorsement case*, 4 Lawrence, Compt. Dec., 457; *Person's case*, 8 Ct. Cl., 543). The expression, "all claims," as applied to accounting officers, must have the same construction in reference to the claim in this case, which asserts a right in equity.

There are cases, in which executive officers are expressly authorized to administer trusts, and, thus, in some measure, to recognize and deal with equitable interests (Rev. Stat., 3659; Act June 11, 1878—20 Stat., 106). But, even in such cases, executive officers generally deal with the legal title in the trustee, and not with collateral or conflicting equities.

It is unnecessary to inquire what might be the result, if Borland, in his conveyance to App, had *recited* the existence of, and had *ratified* a previous verbal-sale; since there is no such recital (1 Greenleaf Ev. §§ 26, 27, 184, 209, 211, 212; *Herman, Estoppel*, Ch. IX, sec. 229; *Id.*, Ch. X, sec. 273; 2 *Parsons, Cont.*, 501, note *u*; *Games et al. v. Stiles*, 14 Pet., 322; s. c., 1 McLean, 321; *West et al. v. Pine et al.*, 4 Wash., 691; *Bank of the United States v. Benning*, 4 Cranch, C. Ct., 81; *Carver v. Jackson*, 4 Pet., 11, 83; *Deery v. Cray*, 5 Wall., 795; *French v. Edwards et al.*, 13 *Id.*, 506; *Bruce et al. v. The United States*, 17 How., 437; *Rawle, Covenants*, 4th ed., 388, 456, 479).

Executive officers may give effect to *recitals*, or *estoppels*, when they respectively *operate per se on the legal title* to a claim, and are evidenced by conclusive matter of record or by writings, on the faith of which said officers and all persons have a right to act; especially if no knowledge exists, or no notice be given, that such recitals or estoppels are

disputed. These constitute the evidence of authority, on which all the world may act in dealing with the rights of parties interested. The evidence thus furnished operates somewhat in the nature of an estoppel against the party who has furnished it. This results from the analogy of the well-settled rule, "that where one of two innocent persons must suffer by the fraud of a third person, he who trusted the third person, and placed the means in his hands to commit the wrong, must bear the loss" (Selser *v.* Brock, 3 Ohio, St., 308; Palmer *v.* Dodge, 4 *Id.*, 27; Fullerton *v.* Sturges, *Id.*, 529; Lickbarrow *v.* Mason, 2 T. R., 70; Lane *v.* Borland, 14 Maine, 77; Root *v.* French, 13 Wend., 572; Bank of St. Clairsville *v.* Smith *et al.*, 5 Ohio, 222).

The principle more directly applicable is, that, "if a man, by neglect of some duty that is owing to another, or to the general public, of which he is one, leads him to believe in the existence of a certain state of facts, and the belief so induced is the proximate cause of leading him to do a certain act, whereby he is prejudiced, the former cannot be afterwards heard as against the latter to show at law that that state of facts did not exist. The same principle obtains in equity" (Kerr, Fraud and Mistake, 136, citing authorities). A party, who *gives authority* to an executive officer to act, on the faith of which the latter does act, cannot be heard to dispute such authority (Bailey *et al. v.* The United States, 109 U. S., 432). But executive officers cannot generally be required to give effect to disputable allegations of fact, from which, when judicially ascertained, an estoppel *in pais* might arise (1 Greenleaf, Ev., § 207).

There may perhaps be cases in which executive officers may give effect to estoppels *in pais* (Herman, Estoppel, ch. XII, sec. 323). But, when evidence of mere acts or verbal admissions is offered to give a retroactive effect to a deed of conveyance against the terms thereof, a *judicial* inquiry is presented, which can generally only be considered in an action in a court of equity, in which all parties in interest can be heard, and can be bound by a decree. But if such inquiry can be made in an action *at law*, as it may be in some cases (Stowe *v.* United States, 19 Wall., 13; s. c., 9 Ct. Cl., 98), it is still *judicial* in character, and can only be considered by a court competent to bind all parties by its judgment (Printers' case, 2 Lawrence, Compt. Dec., 2d ed., 522).

The conclusion is, that the claimant cannot be paid because he has not presented any direct evidence of a *legal right* to the fund in question, nor any evidence, which, in his favor as between him and Borland, *estops* the latter from asserting a claim to the fund.

II. The claimant has no right in equity to relief, if all his allegations were established, and the case made on them could be considered by the Comptroller. The claim made and its legal results, are, that prior to June, in 1862, the claimant verbally purchased the lot in question of Borland, and then took, and afterwards continued, possession, *with an obligation to pay all taxes thereafter imposed*, and further to pay \$6,000,

purchase money, on receipt of a deed of conveyance to him, the claimant, which was made December 22, 1865; that, in the mean time, he received the rents and profits of the lot, and had the use of the purchase money; that he wrongfully permitted the lot to be sold at a direct-tax sale; that the tax-purchaser never obtained possession; that no evidence, that such purchaser obtained any valid title, is offered by said claimant, and that he accepted the conveyance from Borland, and paid the contract-price of \$6,000, but without any interest thereon, *without making a claim to retain any part of such price by reason of the outstanding tax-sale*, and without asking for any assignment of Borland's claim to the surplus proceeds of said tax-sale. If the claimant had performed his duty of paying taxes, there would have been no tax-sale, and, consequently, no such claim as this. He now seeks to profit by his own wrong. In the face of all this, he also seeks to exclude Borland from any claim, and, in the name of conscience and equity, demands to be repaid \$566.80. If the lot had sold at a void tax-sale for \$6,033.20, the claimant could equally ask to be repaid \$6,000 of this, leaving \$33.20 for taxes and costs of sale; and he would thus be made the owner of a lot, *free of cost*, by his skillful, yet unlawful, refusal to perform his duty, to pay the direct taxes assessed upon such lot. This would furnish evidence of financial skill, rather than of any rational equity to be repaid the surplus proceeds of the tax-sale.

The denial of the claim of App for payment, as between him and Borland, is supported by maxims in equity, and by legal principles. "He who seeks equity, must do equity" (1 Story, Eq. Jur. 12th ed., § 64 e). He, who has not done equity, cannot ask equity. It was equitable that App should have paid the direct taxes. Having failed to do this, he is not entitled to be aided, either in seeking a benefit resulting from his own wrongful neglect, or in excluding Borland from claiming such benefit. "A suitor must come into equity with clean hands" (1 Story, Eq. Jur., 12th ed., § 64 e, note). A party, who has refused to perform the obligations of his contract, is in no condition to profit by his failure to do so. The evidence is wholly insufficient to support a claim in equity. The claim is based on allegations of a *verbal sale* in 1862, and of *ratification* by deed in 1865, neither of which is sufficiently proved. The deed, on its face, is only operative *from its date*, December 22, 1865. Parol evidence cannot be received to explain the deed and to give it a retroactive effect, at law, or before accounting officers (1 Greenleaf, Ev., § 275). Such evidence may be admitted in equity, to reform a deed, in case of mutual mistake of the parties. (*Id.*, § 296 a; 3 *Id.*, §§ 360-364.) But this requires the action of a court of equity, in which parties can be heard, and a decree can be made conclusive, as "due process of law," on their rights. Executive officers have no such power over parties, and can render no such judgment.

As between App and Borland, the former has a remedy *at law* on the covenants of warranty in the deed made by the latter. With this

complete remedy *at law*, the claimant has no ground, upon which he can urge a right as *in equity*.

III. This claim may be considered in the view, that effect is to be given to the deed from Borland to App, as *relating back* to the time of the alleged verbal sale. In this view the claim may be urged in either one of two aspects, regarding App (1) as the legal owner in fee of the lot at the time of the tax-sale, or (2) as the assignee, or holder by subrogation, or otherwise, of the rights of Hough. Some general considerations are applicable to the claim in every view of it, taken singly or together. The direct-tax acts of August 5, 1861 (12 Stat., 304, sec. 36), June 7, 1862 (*Id.*, 422), May 9, 1872 (17 Stat., 89), and June 8, 1872 (*Id.*, 332, sec. 9), are to be construed together as parts of one entire system (*United States v. Taylor*, 104 U. S., 219). They were designed to secure to the United States payments of the direct taxes assessed against real property, and of the costs and charges of making sales. In cases of sales for a surplus over and above the sum required to pay such taxes, costs, charges, and commissions, these acts very justly recognize two rights: (1) the right of the *original owner, who has lost his realty by such sale*, to the surplus (Act August 5, 1861—12 Stat., 304, sec. 36), and (2) the right of the tax-purchaser to be repaid the tax-sale purchase-money, when he may, without collusion, be evicted by the judgment of the proper court of the United States in favor of the original owner, his heirs, or assigns. (Act May 9, 1872—17 Stat., 89; Act June 8, 1872—*Id.*, 332, sec. 9.)*

With this general view of the direct-tax acts, the right of the claimant will now be considered in the two aspects stated:

1. The claim, assuming App to be the legal owner of the lot in question at the time of the tax-sale, would seem to find some support in the case of the *United States v. Taylor* (104 U. S., 216; s. c., 14 Ct. Cl., 339). In that case the facts were, as follow:

"That block 37, in Little Rock, Arkansas, was, on May 4, 1865, subject under the provisions of law to a direct tax of \$37, which was assessed thereon to Matilda Johnson; that this tax was so assessed to Matilda Johnson, notwithstanding the fact that on May 4, 1865, Irene M. Jordan was, and ever since March 4, 1863, had been, the owner of said block by purchase from said Matilda Johnson; that the assessment was made against Mrs. Johnson because she appeared by the records to be the

* Section 9 of the act of June 8, 1872 (17 Stat., 332), is, as follows:

"That in all cases where the owner of any land sold for taxes as aforesaid, his heirs or assigns, has recovered or shall recover the same from the purchaser, his heirs or assigns, without collusion on his or their part, by the judgment of any United States court, by reason of a failure without his or their fault or neglect, of the title of the purchaser derived from said sale, the Secretary of the Treasury, on the payment into the Treasury, by the clerk, of the money deposited with him as aforesaid, and on being satisfied that any purchaser, his heirs or assigns, without his or their collusion, has been evicted from or turned out of possession of any such land by the judgment of any United States court, in the manner before mentioned, is hereby authorized, out of any money in the Treasury not otherwise appropriated, to repay to the person or persons entitled thereto a sum of money equal to that originally paid by the purchaser of the land so recovered, if the same has been paid into the Treasury, or to any person legally authorized to receive the same for the United States."

owner of the block, her deed to Mrs. Jordan not having been recorded until Aug. 25, 1866; that the board of direct tax-commissioners for the district in which the block was situate sold it, May 4, 1865, to one Meservey, because of the non-payment of said tax, for the consideration of \$3,000, of which sum the United States was entitled to \$70.50, on account of the tax and the costs and charges and commissions of sale; that in 1865 Mrs. Jordan became the owner of the tax-sale title by purchase for a valuable consideration from Meservey's assignee; that on Dec. 10, 1873, Mrs. Johnson, the former owner, by her formal instrument of writing of that date, recognized Mrs. Jordan, who before that date had intermarried with Charles M. Taylor, as the rightful owner of said block, and of the money in the treasury realized from the tax-sale thereof; and that on Jan. 15, 1874, Taylor and wife made application to the Secretary of the Treasury for the residue of the \$3,000, the proceeds of said tax-sale, after deducting therefrom the tax, penalty, costs, &c. This application was rejected on the 17th of that month."

The claimant recovered judgment for \$2,929.50. The only questions considered by the Supreme Court were, whether section 36 of the act of August 5, 1861 (12 Stat., 304), which gave *the original owner* the right to the surplus proceeds of the tax-sale, was repealed by subsequent legislation, and whether the right of action was barred by the statute of limitations; both of which questions were decided in the negative. The above case in the Supreme Court seems to indicate that the plaintiff recovered *in her own right as original owner* of the fee, and *not as assignee of any right of the tax-purchaser*. It does not distinctly appear, whether or not the plaintiff *lost her title and possession* by the tax-sale; but it may, perhaps, be inferred that she did not, though the question does not seem to have been considered. If that case did not decide on the materiality of this question, there may be some grounds for maintaining that a land owner, who has, not paid the direct tax, nor purchased the *valid* outstanding tax-sale-title, or been by the tax-purchaser evicted or disturbed in his possession, would not seem to have any just claim to money paid by such tax-purchaser to the United States. The direct-tax acts do not say in *exact terms* that the surplus of the proceeds of a tax-sale can only be paid to a land owner, *who has lost his realty by such sale*; but there is at least some ground for giving those acts this construction, because of the *reason*, on which they rest, of the injustice of any other construction, of other provisions of the acts looking in this direction, and of the general analogies as to conveyances of land, and covenants therein, as affected by possession or eviction. It has been said by high authority, that a purchaser of land with covenant of warranty cannot recover for breach thereof, without an "actual entry and dispossession, adversarily and lawfully made under paramount title" (Rawle, Covenants, 4th ed., 146; *Gore v. Brazier*, 3 Mass., 540; *Sprague v. Baker*, 17 *Id.*, 590; *Smith v. Shepard*, 15 Pick., 147; *Rickert v. Snyder*, 9 Wend., 422). But, if the existence of an outstanding paramount-title, and its purchase by the holder of a warranty, could give a right of action thereon, the United States has no liability as warrantor to App, and

hence he cannot claim the benefit of a warranty. He can only take what the *statute gives*, a right to the surplus proceeds of tax-sale, on the terms and conditions the statute requires. Whether a loss of possession without a judicial judgment, and without collusion, but by "dispossession adversely and lawfully made under *paramount* [and valid tax-sale] title," would give the original owner a right to the surplus proceeds of the tax-sale, would be a question proper for consideration, if it existed in this case, but it does not.

When the *tax-purchaser* makes the claim authorized by statute for a refund of the purchase-money in case his tax-title is invalid, he is required to prove such invalidity by the actual judgment of eviction of a "United States court" (act May 9, 1872—17 Stat., 89; act June 8, 1872—*Id.*, 332). It may be said that the proper certificate of tax-sale is *prima facie* evidence of title in the purchaser (*De Treville v. Smalls*, 98 U. S., 517; *Keely v. Sanders*, 99 U. S., 441; *Sherry v. McKinley*, *Id.*, 496). But it does not follow, that the tax-purchaser will assert his right against the original owner in possession. And the validity of a tax-sale is so essentially a *judicial* question, that executive officers cannot be said to have the requisite means of trying or deciding it. But this case does not require the decision of the question suggested. Without reference to it, for reasons already stated, the claimant has shown no right to payment.

2. The claimant acquires no right against the United States under the conveyance to him from the *tax-purchaser*, whether it relate back or not. The acts of May 9, and June 8, 1872, give to a tax-"purchaser, his heirs or assigns," a right to a refund of the purchase-money paid at the tax-sale, "in all cases where the [original] owner of any land sold for taxes * * *, his heirs or assigns, has recovered or shall recover the same from the purchaser, his heirs or assigns, without collusion on his part or their part, by the judgment of any United States court, by reason of a failure without his or their fault or neglect, of the title of the purchaser derived from said [tax] sale." These acts so carefully guard against any *collusive eviction*, that they *admit no evidence* of eviction but the "judgment of a United States court." Literally construed, they apply only to evictions in actions brought *by the original owner*, his heirs or assigns. The question, whether, if a tax-purchaser brought ejectment on his tax-title, and, without collusion, *failed to recover*, this would be, *within the equity, spirit, and purpose* of these acts, equivalent to an *eviction*, does not require decision in this case. In order to give effect to the purpose of statutes, they are sometimes, by construction, made to apply to cases clearly within their spirit and purpose, but not within their letter; and they are held not to apply to cases within their letter when clearly not within their spirit (*Co. Lit.*, 24 b; *Sedgwick, Construction Stat. and Const. L.*, 2d ed., 254; *Hardcastle, Statutory Law*, 39; *Bishop, Written Laws*, 232).

Said acts of May 9, and June 8, 1872, give the right to a refund of the purchase-money, *only* on the conditions and evidence, and by the mode of procedure or form of remedy therein specified. They give a new and inchoate right, and prescribe the means, by which it may be perfected, and the remedy may be enforced. And it is a settled rule, that, "where a new right, or the means of acquiring it, is conferred, and an adequate remedy for its invasion is given by the same statute, parties injured are confined to the statutory redress" (*Smith v. Lockwood*, 13 Barb., 209; *Dudley v. Mayhew*, 3 Const., N. Y., 9; *Sedgwick, Construction Stat. and Const. L.*, 2d ed., 76; *The State of Ohio ex rel. Grisell v. Marlow*, 15 Ohio, St., 134; *Farmers', etc., National Bank v. Dearing*, 91 U. S., 35; *Barnet v. National Bank*, 98 U. S., 558; *Kendall v. Vanderlip*, 2 Mackey, Supreme Ct. Dist. Col., 107). And the *remedy prescribed by the statute* must be *strictly pursued* (*Sedgwick, Construction Stat. and Const. L.*, 2d ed., 272; *Benjamin v. Benjamin*, 1 Seld., 383; *Bishop, Written Laws*, 249, 250). Thus, it is clear, that Hough, the tax-purchaser, never perfected a right to a refund, in the mode required by the statute, and so could not, by the conveyance made to App, transfer any such right. The conveyance is, on its face, a sale and quitclaim of whatever title or color of title Hough had to the lot in question, not professing to transfer *any claim against the United States*, and with *no warranty running with the land*. The assignment of a non-negotiable claim against the United States, as in this case, is as a general rule, void (*Rev. Stat.*, 3477; *Claims-Assignment case*, 3 Lawrence, Compt. Dec., 13). And such claim is not assignable at common law (*Rawle, Covenants*, 4th ed., 319; *Greenby and Kellogg v. Wilcocks*, 2 Johns., 1). Undoubtedly, there may be cases, in which a claim *runs with the land*, and so passes by a grant thereof, as the right to damages for a *subsequent* breach of a covenant "for quiet enjoyment, for further assurance, and of warranty" (*Rawle, Covenants*, 4th ed., 318, 341, 348, 355, 361; *King v. Jones and Rowland*, Extrs., 5 Taun., 418; 2 *Fitz-Herbert*, Nat. Brev., 145; 1 *Shep., Touch.*, 175). "Covenants which run with the land do not pass *by direct operation of assignment*, but as *annexed and incident to the land* to which they relate" (*Rawle, Covenants*, 4th ed., 362). But Hough, the tax-sale-purchaser, has made no conveyance with *warranty*, and, hence, no claim, as *incident to the title* to the lot, passed from him to App. And if no valid title passed, no claim incident to the title could pass (*Rawle, Covenants*, 4th ed., 348; *Lewis v. Cook*, 13 Ired., Law, 193). So there may be cases in which a grantee of land may be *subrogated* to the rights of the grantor. But there is nothing in the law of subrogation which transfers any claim against the United States to App. The act of June 8, 1872, does give to the tax-"purchaser, *his heirs or assigns*," the right to a refund, in case of *eviction by the judgment of a court of the United States*. This act thus makes the *claim* to a refund, not technically assignable, but as *passing*

by a grant or release of such defective title as the tax-purchaser, his heirs or assigns, had.

The right to a refund, by force of a judgment of eviction, or, perhaps, of some equivalent judgment or decree, arises as an *original right* in favor of the original tax-purchaser or his heir if either be evicted, or in favor of his vendee who may be evicted. The eviction fixes the right by force of the statute (Allspach's case, 2 Lawrence, Comrt. Dec., 2d ed., 260).

There is nothing in the law to prevent the original owner of the land from taking a quitclaim from the tax-purchaser. And on *general principles*, App is not estopped from denying the validity of the tax-sale by accepting a quitclaim from Hough. A party in possession has a right to *cumulate* evidences of title without losing any right which he already has (Coakley v. Perry and Payne, 3 Ohio, St., 344; Alexander and others v. Pendleton, 8 Cranch, 462; Shannon v. Kinny *et al.*, 1 A. K. Mar., 4; Pleak v. Chambers, 7 B. Mon., 565; Angell, Lim., section 414; Jackson v. Ellis, 13 Johns., 118; Lessee of Ludlow's heirs v. McBride, 3 Ohio, 240; McIver's Lessee v. Reagan, Cooke, 366; Napier's Lessee v. Simpson, 1 Tenn., 448). But the original owner, by taking such quitclaim, puts himself in a position, in which *he* cannot secure the *judicial determination* required in terms by the act of June 8, 1872, in order to give him a right to demand the refund authorized in favor of the tax-purchaser, "his heirs or assigns." Whether there could be *some equivalent proceeding*, by a decree of a court of the United States in favor of App against Borland, and Hough the tax-sale purchaser, to *determine* the invalidity of the tax-sale, and thus to give to App all the rights of Borland and the tax-purchaser, it is not necessary now to consider. No such decree has been obtained. It may be said, that, on substantial principles of justice, when the original owner has purchased in, either a valid or an invalid tax-title, so that there can be no such judgment of eviction as required by the statute, he should have the same remedy as if he had gone through the formality of prosecuting an action to judgment or decree. This, however, is a question which addresses itself to legislative discretion, and over which no discretion can be exercised by judicial or executive officers. The common law does not require the performance of impossible, vain, or useless things. But the law-making power, when giving a right, may do so, as in this case, only on the performance of such conditions, and upon such evidence, as the statute may prescribe.

The claim is rejected.*

TREASURY DEPARTMENT,

First Comptroller's Office, February 5, 1884.

*After the rendering of this *decision* by the First Comptroller, the attorney for the claimant filed papers purporting to *appeal* therefrom to the Secretary of the Treasury, on the ground, that section 36 of the act of August 5, 1861 (12 Stat., 304), provides, that the claimant for surplus proceeds of a direct tax-sale "shall make application

therefor to the Secretary of the Treasury, who, upon such application, shall, by warrant on the Treasury, cause the same to be paid to the applicant."

Said attorney transmitted with the papers a bond to indemnify the United States against loss by reason of any other claim to such surplus proceeds. This was disposed of by the following letter:—

"TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
Washington, D. C., April 8, 1884.

GILBERT MOYERS, Esq.,
Attorney-at-law, Washington, D. C. :

SIR: In your letter of the 31st ultimo you enclosed, for my "consideration in the claim of Matthias App for surplus proceeds of sale of land for direct taxes" in Memphis, Tennessee, an indemnifying bond in the sum of \$1,200.00 as a protection for the United States government against a duplicate payment of said surplus, and you asked that the claim be now allowed as recommended by the Commissioner of Internal Revenue.

I reply that I am informed by the First Comptroller that he has disallowed said claim, and I have to add that I regard that ruling as conclusive on me.

Very respectfully,

H. F. FRENCH,
Acting Secretary."

The above letter was also concurred in by the Secretary.

It is undoubtedly correct, that no appeal can be taken from the decision of the First Comptroller; which must be so for several reasons:

1. This is the effect of an express provision of the statute. Section 191 of the Revised Statutes declares, that:

"The balances which may from time to time be stated by the Auditor and certified to the heads of Departments by * * * the Comptrollers of the Treasury, upon the settlement of public accounts, shall not be subject to be changed or modified by the heads of the Departments, but shall be conclusive upon the executive branch of the Government, and be subject to revision only by Congress or the proper courts."

When an Auditor states an account, and reports the same to a Comptroller, and the latter officer certifies that nothing is due to a claimant, this is a balance "certified," and the decision of the Comptroller is final and "conclusive upon the executive branch of the Government." There must be *some point*, at which a decision is final, and this point is clearly and unequivocally fixed by the statute.

The conclusive effect of the final decision of a Comptroller is now well understood. Thus, in the Real Estate Savings Bank's case (16 Ct. Cl., 352), the Court of Claims, in discussing the effect of the decision of a Comptroller says, that:

"His decisions, so far as they relate merely to the balances which are found and stated by him, are in that respect conclusive upon the executive branch of the Government."

And in the same case (*Id.*, 335), it was held, that "the Secretary of the Treasury and the Commissioner of Internal Revenue are not accounting officers" (McKee's Case, 12 Ct. Cl., 553).

2. To hold that an appeal lies from the decision of a Comptroller to the Secretary of the Treasury, would necessarily make the latter an accounting officer. He has never been so regarded. No statute has made him such in name, nor has any, in terms, or by any reasonable inference, devolved on him the duties of an accounting officer. It would be utterly impracticable to devolve any such duties on the Secretary. The Secretary is charged with a duty, in some cases, of employing persons to perform certain duties, and of fixing their compensation; and the amount of compensation thus fixed in pursuance of law is generally conclusive, if the services are performed. But this is in advance of the process of accounting, and is no part thereof. It only becomes an item of evidence before the accounting officers. The Secretary may "prescribe regulations, not inconsistent with law, for the government of his Department," and these, subject to his control, have the force of law (Rev. Stat., 161). But the power, to prescribe regulations, is entirely different from the jurisdiction to audit and settle accounts (16 Op., Att.-Gen., 497). Whenever Congress has deemed it

proper to require the head of a Department "to investigate and adjust" a claim, it has been done by special provision of law, as in the Joint Resolution of July 15, 1870 (16 Stat., 673; *Chorpenning v. United States*, 94 U. S., 397).

3. The same result follows from the fact, that the statutes have provided for accounting officers, have defined their jurisdiction, have given them full authority to receive, examine, and settle all accounts against the United States, and have made it the duty of the proper Comptroller to certify the balances arising thereon (Rev. Stat., 236, 277, 269, 291). This power to certify, or make certain, is, *ex ri termini*, final, as a part of the accounting system, and has been so regarded in repeated opinions of the Attorneys-General (13 Op. Att.-Gen., 5; 14 *Id.*, 65; 15 *Id.*, 139, 626).

4. It seems to have been supposed that an appeal lies from the decision of a Comptroller as to the allowance of a claim for the surplus proceeds of a direct-tax sale, because section 36 of direct-tax act of August 5, 1861 (12 Stat., 304), provides that the claimant "shall make application therefor to the Secretary of the Treasury, who, upon such application, shall, by warrant on the Treasury, cause the same to be paid to the applicant." It is clear, that this provision gives no right to appeal, for several reasons:

(1) It does not, in terms, give any right of appeal. To hold that it gives such right, is to give its words a meaning not found in them. When Congress has intended to provide for an appeal from the decision of an accounting officer, or for a revision of his judgment, it has been deemed necessary to say so in express terms, as when an appeal is taken to the First Comptroller from the action of the Auditor of the Treasury for the Post-Office Department (Rev. Stat., 270), and when the Comptrollers review the action of Auditors (Rev. Stat., 269, 273, 317).

(2) The provision, requiring the Secretary, "by warrant on the Treasury, [to] cause the same [surplus proceeds of tax-sale] to be paid to the applicant," simply means, that the Secretary shall cause it to be paid in the manner prescribed by the statutes, which regulate the mode of making all other payments—that is, in this case upon a balance certified by the First Comptroller on an account stated and report made to him by the Fifth Auditor. The statutes require these officers to examine and adjust all claims of this character. Many statutes contain the expression, that specified officers shall "pay" designated classes of claim. Thus, the act of March 3, 1857 (11 Stat., 200), declares, "that the Commissioner of the General Land-Office * * * is hereby required to state an account between the United States and the State of Mississippi, * * * and [to] allow and pay to the said State five per centum thereon," &c. But it has never been supposed, that this, or any similar act, literally gave the officer so designated authority to pay money out of the Treasury. The only effect of such act is, to authorize payment in the mode prescribed by other laws—that is, upon a balance duly certified by the proper Comptroller. Payment is to be made by Treasury warrant, granted by the Secretary of the Treasury (Rev. Stat., 248), and countersigned by the First Comptroller (Rev. Stat., 269; *Nebraska Five Per Cent. Case*, 4 Lawrence, Compt. Dec., 251). The act of June 20, 1874 (18 Stat., 109), which refers to "the employment and payment by the Department of Justice of district attorneys * * * for the performance of services," &c., is another statute of this class. No payment is, in fact, made by the Department of Justice. Payments are made only as in other cases. The direct-tax act of August 5, 1861 (12 Stat., 297, sec. 12), authorizes the Secretary of the Treasury to "establish regulations suitable and necessary for carrying this act into effect." The regulations prescribed declare, in effect, that all direct-tax accounts shall be accounts of the Commissioner of Internal Revenue; and they have, in practice, always been so regarded. Section 277 of the Revised Statutes requires the Fifth Auditor to adjust all accounts of the Commissioner of Internal Revenue; section 269 requires the First Comptroller to examine, and to certify balances on all accounts settled by the Fifth Auditor; and section 191 declares the effect of the decision of the Comptroller as conclusive on the executive department, and that, when so made *conclusive*, there can be no appeal or re-

view. On well-settled principles, all these statutes are to be construed together as parts of one system, and effect is to be given to all. The direct-tax act of August 5, 1861, does not in terms, and clearly cannot by implication, repeal the provisions of other statutes providing a general system of accounting. These statutes are *general* in character, and apply to, and bring within their operation, all claims against the United States, unless otherwise expressly, and in clear terms specially, excepted. This effect of a *general statute*, as controlling *others*, on any subject-matter, to which such general statute by its terms can properly apply, has been illustrated in many cases (Page v. Burnstine, 102 U. S., 664).

(3) The act of March 3, 1883 (22 Stat., 595), which makes an appropriation to pay claims for the surplus proceeds of direct-tax sales, recognizes, but is not at all necessary to establish, the principles already stated. This act declares, that "the Secretary of the Treasury is hereby authorized and directed to cause to be audited by the proper accounting officers of the Treasury and paid the claims * * * for the surplus proceeds of" the direct-tax sales. The necessary effect of this is, to place the auditing of these claims on the same footing with other claims, from the decision on which there is no appeal. A question as to the right of appeal, in some respects similar to this, was recently decided by the Supreme Court of the District of Columbia in General Term in the case of *The United States ex rel. Hoe & Co. v. Butterworth*, Commissioner of Patents, which is reported in 12 Washington Law Reporter (258), and will also be reported in 3 Mackey's Reports (Supreme Ct., Dist. Col.). The points decided are:

"1. The decision of the Commissioner of Patents on the right of an applicant to receive a patent, is an act of executive discretion and cannot be interfered with by mandamus.

2. So, too, after the decision has been made and communicated to the applicant, and at any time before the issue of the patent for the signature of the Secretary of the Interior, it is within the Commissioner's discretion to reconsider his decision and to make a contrary one.

3. But if he does not, then his executive discretion being exhausted in deciding that the applicant is entitled to a patent, there remains but the ministerial duty to issue it; and to compel the performance of this act, in case of refusal, mandamus is the proper remedy.

4. It is a settled rule that the Revised Statutes are to be construed in the light, of the original statutes from which they were taken.

5. An appeal from the decision of the Commissioner of Patents upon the right of an applicant to receive a patent, lies directly from him to this court in General Term and not to the Secretary of the Interior; the latter has no appellate or revisory power over the decision of the Commissioner upon that question."

Mr. Justice James delivered an elaborate and able opinion, in which he said:

"The claim of revisory power in the Secretary of the Interior was based in the argument upon the following provisions of the Revised Statutes:

'Section 441. The Secretary of the Interior is charged with the supervision of public business relating to the following subjects: First, the census, when directed by law; second, the public lands, including mines; third, the Indians; fourth, pensions and bounty lands; fifth, patents for inventions; sixth, the custody and distribution of publications; seventh, education; eighth, government hospital for the insane; ninth, Columbia asylum for the deaf and dumb.'

'Section 481. The Commissioner of Patents, *under the direction of the Secretary of the Interior*, shall superintend or perform all duties respecting the granting and issuing the patents directed by law.'

'Section 483. The Commissioner of Patents, *subject to the approval of the Secretary of the Interior*, may from time to time establish regulations, not inconsistent with law, for the conduct of proceedings in the Patent Office.'

'Section 487. For gross misconduct, the Commissioner of Patents may refuse to recognize any person as a patent agent, either generally or in any particular case; but the reasons for such refusal shall be duly recorded, and be *subject to the approval of the Secretary of the Interior*.'

'Section 4883. All patents shall be issued in the name of the United States of America, under the seal of the Patent Office, and shall be *signed by the Secretary of the Interior*, and countersigned by the Commissioner of Patents.'

Especial emphasis, of course, was laid upon section 481, which provides that the Commissioner shall perform his duties under the direction of the Secretary. It is

claimed broadly, that, 'The power of supervision and direction gives jurisdiction' to the Secretary, upon application made to him in any form that he may prescribe, by appeal or otherwise, to affirm, reverse, or modify the action of the Commissioner.'

The provisions referred to, and all of the provisions of the Revised Statutes which we shall have occasion to consider, were taken from the act of July 8, 1870, which was entitled 'An act to revise, consolidate and amend the statutes relating to patents and copy rights.' In that work of consolidation, section 481 was taken, without any change except the rejection of redundant words, from the first section of the act of July 4, 1836, by which the office of Commissioner of Patents was first established. It is of some importance, therefore, to examine the extent of the supervisory powers of the Secretary of State, as given by this same provision in the original act.

Section seven of that act provided that the Commissioner should 'make, or cause to be made,' an examination of every application for a patent, and that, if, after certain proceedings had, he should decide that the applicant was not entitled to a patent, an appeal might be taken to a board of examiners, 'to be composed of three disinterested persons,' appointed for that purpose by the Secretary of State, one of them, at least, to be 'selected, if practicable and convenient, for his knowledge and skill in the particular art, manufacture or branch of science,' to which the alleged invention appertained. This board might 'reverse the decision of the Commissioner, either in whole or in part,' and when their opinion was certified to him, he was to be governed by it in the further proceedings to be had. Section eight related to interference cases, and provided a like appeal with like effect, from the Commissioner's decision.

The act of 1836 provided, then, that the Commissioner should perform his duties respecting the granting and issuing of patents, under the direction of the Secretary of State, and it also provided that he should make a decision on the question whether an applicant was entitled to a patent; but it provided further that these decisions should be revised and controlled by a board of examiners. This revision was part of the regular course of executive administration, and the statute gave the Secretary no control over the board of examiners. It is obvious, then, that the Secretary's control over the Commissioner could not be exercised in the form of revisory power over his decisions. Now, it is nothing to the purpose to suggest here that a revisory tribunal no longer intervenes between the Commissioner and the Secretary's control, and that the decisions of the former are thus brought within the operations of the Secretary's direction. The point to be observed is, that the directory power of the Secretary of State and of the Secretary of the Interior was expressed in the same terms, and that that grant of power, as found in the act of 1836, did not pretend to give appellate and revisory power over the decisions which the Commissioner was authorized to make. Let us see whether anything in the act of 1870, which is found in the Revised Statutes, requires us to adopt a different rule in construing the same language.

It is important to observe just here, that, although section 461 of the Revised Statutes, which gives the Secretary of the Interior directory power over the duties of the Commissioner of Patents, is found in the Title XI, relating to the organization of the Interior Department, and the sections which we shall consider are found in Title LX, relating to the subject of patents and copyrights, all of them were taken from the act of July 8, 1870. In that act they formed parts of one system, and were to be construed together as such. It is a settled rule of construction of the Revised Statutes that its contents are to be construed in the light of the original statutes from which they were taken. This section relating to directory power is, therefore, to be regarded as part of the general system, of which the sections now to be considered are also a part. The following sections provide a system of appeals by which all applications, whether in interference cases or *ex parte*, may be brought before the Commissioner for his decision:

'Section 4904. Whenever an application is made for a patent, which, in the opinion of the Commissioner, would interfere with any pending application, or with an unexpired patent, he shall give notice thereof to the applicants, or applicant and patentee, as the case may be, and shall direct the primary examiner to proceed to determine the question of priority of invention. And the Commissioner may issue a patent to the party who is adjudged the prior inventor, unless the adverse party appeals from the decision of the primary examiner, or of the board of examiners-in-chief, as the case may be, within such time, not less than twenty days, as the Commissioner shall prescribe.'

'Sec. 4909. Every applicant for a patent, or for the reissue of a patent, any of the claims of which have been twice rejected, and every party to an interference, may appeal from the decision of the primary examiner, or of the examiner in charge of interferences in such case, to the board of examiners-in-chief; having once paid the fee for such appeal.'

'Sec. 4910. If such party is dissatisfied with the decision of the examiners-in-chief, he may, on payment of the fee prescribed, appeal to the Commissioner in person.'

These sections, as we have said, provide a regular system of appeals, both in interference and *ex parte* cases, which brings every application to the Commissioner for decision. The statute commands him to decide, and of course it intends that he shall

apply the usual processes of decision; in other words, the *judgment* of the person deciding. Can it be possible that the legislature intended, by giving the Secretary directory power, that he might intervene at this point of time, and direct the Commissioner what decision he, the Commissioner, was to make? It must be kept in mind that the whole of the Secretary's power must be found within that one word, 'direction.' It hardly seems worth while to reason upon the question, whether a general power to direct authorizes the directing officer to dictate to one, who is charged by the very same law with the duty and power of hearing the parties to a contest, and of deciding between them accordingly, what conclusion his mind must reach. Clearly he cannot, in the exercise of this power, dictate to the Commissioner touching his decision before he makes it, or while he is making it. Can it be imagined, then, that the power of 'direction,' which cannot lawfully be applied to the Commissioner's action while he is deciding, was intended to be applied to the same matter after he had decided? Is it permissible to say that a power of direction, which cannot be exercised *as* direction, may be exercised by way of appeal and reversal, and all the time be called 'directing.'

We are informed by the pleadings and exhibits that the Secretary of the Interior has acted upon the opinion of a former Attorney-General to the effect, that this general provision of directory power controls the meaning of every section which assigns a duty to the Commissioner, just as if it had been inserted in each; and that the duty and power of hearing and deciding contested questions of priority of invention, for example, are to be construed as if the statute said they were to be performed under the direction of the Secretary. We hold that precisely the opposite rule of construction must be applied to the statute in order to ascertain correctly the intention of the legislature. It must be remembered that this provision is general, and that the provisions relating to the duties and powers of the Commissioner are specific. It is the latter which must control. When they are considered together, it must be held that the Commissioner must perform his duties under the direction of the Secretary except when he is already directed what he must do by the superior directory power of the legislature. Applying this rule of construction to the Commissioner's decisions in cases of interference, we hold that they are not subject to the directory power of the Secretary, either by contemporaneous dictation, or by the circumlocution of appeal and reversal, described as direction.

We are brought to this conclusion independently of the provisions of the patent laws which remain to be considered; but we are still further confirmed by these provisions.

Section 4910, as we have seen, provides for an appeal to the 'Commissioner in person.' Section 4911 then provides that, 'If such party, except a party to an interference, is dissatisfied with the decision of the Commissioner, he may appeal to the Supreme Court of the District of Columbia, sitting in banc.' By section 4913, the Commissioner is required to furnish the court with 'the grounds of his decision, fully set forth in writing, touching all the points involved by the reasons of appeal.' Section 4914 confines the revision here to the points set forth in the reasons of appeal, and provides that, after hearing the case, this court shall return to the Commissioner a certificate of its proceedings and decisions which shall be entered of record in the Patent Office, 'and shall govern the further proceedings in the case.'

These sections authorize a revision of the grounds on which the Commissioner refuses a patent on application *ex parte*, and they do not authorize a revision of the grounds on which the Secretary may act. Manifestly it was the intention of Congress to provide a judicial revision which should be available in every case in which an application *ex parte* is refused; in other words, that refusal should not be made by an officer whose grounds of decision are not subjected to revision by this section.

Section 4915 provides a still further remedy in case of the refusal of a patent for application *ex parte*, and applies the remedy to refusal of an application in interference. It directs that:

'Whenever a patent on application is refused, either by the Commissioner of Patents or by the Supreme Court of the District of Columbia upon appeal from the Commissioner, the applicant may have remedy by bill in equity; and the court having cognizance thereof, on notice to adverse parties and other due proceedings had, may adjudge that such applicant is entitled, according to law, to receive a patent for his invention, as specified in his claim, or for any part thereof, as the facts in the case may appear. And such adjudication, if it be in favor of the right of the applicant, shall authorize the Commissioner to issue such patent, on the applicant filing in the Patent Office a copy of the adjudication, and otherwise complying with the requirements of law. In all cases where there is no opposing party, a copy of the bill shall be served on the Commissioner; and all the expenses of the proceeding shall be paid by the applicant, whether the final decision is in his favor or not.'

This section, and the provisions for appeal to this court, which we have just considered, provide either a formal appeal or an original proceeding substantially appellate in its character, which seems manifestly intended to cover *all* cases in which a

patent is refused, whether they be cases of application *ex parte* or in interference. It is to be observed that in both cases a refusal by the Commissioner is the basis of the remedy; and that it seems to be thus implied that, so far as the executive department is concerned, the examination of a claim for a patent, and the power to decide upon such claim, terminate with him.

But another class of decisions was still to be provided for. The provisions which we have considered relate only to cases in which patents were refused; but it might happen that a patent was improperly granted. A remedy for such cases is found in section 4918, which provides that:

'Whenever there are interfering patents, any person interested in any one of them, or in the working of the invention claimed under either of them, may have relief against the interfering patentee, and all parties interested under him, by suit in equity against the owners of the interfering patent; and the court, on notice to adverse parties, and other due proceedings had according to the course of equity, may adjudge and declare either of the patents void in whole or in part, or inoperative or invalid in any particular part of the United States, according to the interest of the parties in the patent or the invention patented. But no such judgment or adjudication shall affect the right of any person except the parties to the suit and those deriving title under them subsequent to the rendition of such judgment.'

In this review of the patent laws certain facts are prominent. The same statute which provides that the Commissioner of Patents shall 'perform all duties respecting the granting and issuing of patents,' under the 'direction of the Secretary of the Interior,' provides expressly and in detail for a regular course of examination; it provides expressly for a regular course of appeals from the primary examiners to the examiners-in-chief, from the examiners-in-chief 'to the Commissioner in person,' and for a decision by him upon the right of an applicant to receive a patent; it does not provide expressly for an appeal from the Commissioner's decision to the Secretary of the Interior, but it does provide expressly for an appeal and revision of those decisions by this court, or for an original judicial proceeding by which relief against those decisions may be had. These provisions of appeal and relief constitute a system, and, when the legislature provides such a system, we must suppose that it was intended to be complete and sufficient. As no place in that system was assigned to the Secretary of the Interior, it cannot have been intended that he should have one. Taken in connection with these provisions, his general power of 'direction' must be construed to be a power to direct, except when the Commissioner is authorized by the same statute to make 'decisions.'

We hold, then, that the attempted reversal of the Commissioner's decision by the Secretary in the case before us was unauthorized, and therefore a nullity; and that, consequently, the Commissioner, having finally adjudicated that the relators are entitled to a patent, improperly refused to issue the same. The writ of peremptory mandamus will accordingly issue as prayed for."

The foregoing case is now pending in the Supreme Court of the United States, where it will be finally decided. It is understood that the judgment in this case overrules an opinion given by Attorney-General MacVeagh on the same subject. Another opinion, given by him October 22, 1881, on a question involving to some extent a similar principle, has not been concurred in by an officer charged with the duty of deciding (1 *Lawrence*, *Compt. Dec.*, 2d ed., App., Ch. XII, 553.) Official authority depends on the law, not on the real or imaginary dignity of position.

IN THE MATTER OF THE EFFECT OF SECTIONS 36 OF THE ACT OF AUGUST 5, 1861 (12 STAT., 304), AND 12 OF THE ACT OF JUNE 7, 1862 (*Id.*, 425),—DIRECT-TAX CASE (SECOND).

Upon the *original sale* of lands in an “*Insurrectionary District*” for direct taxes, under the act of June 7, 1862 (12 Stat., 422), to a purchaser for an amount in excess of “the tax, costs, charges, and commissions”—

(*Held* :)

1. That the *owner* of such lands at the time of the tax-sale is entitled to payment of “the surplus of the proceeds of the sale, after satisfying the tax, costs, charges and commissions.”
2. That neither “the governor of * * * [the] State wherein said lands are situated,” nor the State, is entitled to payment of any portion of the proceeds of said sale.
3. That the provisions of section 12 of the act of June 7, 1862 (12 Stat., 425), requiring “that the proceeds of * * * sales shall be paid into the Treasury of the United States, one-fourth of which shall be paid over to the governor of said State wherein said lands are situated, * * *”, and one-fourth shall also be paid over to said State,” apply to the *proceeds of those sales made after* the lands “shall have been struck off to the United States at * * * [*the original tax-*] sale.”
4. That under section 36 of the act of August 5, 1861 (12 Stat., 304), payments of the *surplus proceeds*, “after satisfying the tax, costs, charges, and commissions,” of the *original tax-sales* of lands in “insurrectionary districts,” and elsewhere, for direct taxes, may now be made to those persons who were the *owners* of such lands at the time of the tax-sales, without any further action of Congress.
5. The ruling of the First Comptroller in Direct-Tax Case (3 Lawrence, Compt. Dec., 331, 345)—that no portion of the proceeds of *those sales* of lands in “insurrectionary districts” for direct taxes, *made after* the lands were “struck off to the United States at * * * [*the original tax-*] sales,” can now be paid, under section 12 of the act of June 7, 1862 (12 Stat., 425), either “to the governor of * * * [the] State wherein said lands are situated,” or to the State—re-affirmed.

SUPPLEMENT TO DIRECT-TAX CASE (3 Lawrence, Compt. Dec., 331)—Upon the *original sale* of lands in an “*Insurrectionary District*” for direct taxes, under the act of June 7, 1862 (12 Stat., 422), to a purchaser for an amount *in excess of* “the tax, costs, charges, and commissions,” two questions arise :

1st. Is the owner of such lands at the time of the tax-sale entitled to payment of “the surplus of the proceeds of the sale”?

2d. Is “the governor of * * * [the] State wherein said lands are situated,” or the State, entitled to payment of any portion of the proceeds of said sale?

The case of the United States *v.* Taylor (104 U. S., 216) is decisive on both these questions.

Section 36 of the act of August 5, 1861 (12 Stat., 304), provides that:

“The surplus of the proceeds of the sale, after satisfying the tax, costs, charges, and commissions, shall be paid to the owner of the prop-

erty, or his legal representatives, or if he or they cannot be found, or refuse to receive the same, then such surplus shall be deposited in the Treasury of the United States, to be there held for the use of the owner or his legal representatives, until he or they shall make application therefor to the Secretary of the Treasury, who, upon such application, shall, by warrant on the Treasury, cause the same to be paid to the applicant," &c.

Section 12 of the act of June 7, 1862 (12 Stat., 425), provides:

"That the proceed of said leases and sales shall be paid into the Treasury of the United States, one-fourth of which shall be paid over to the governor of said State wherein said lands are situated, or his authorized agent, when such insurrection shall be put down, and the people shall elect a legislature and State officers, who shall take an oath to support the Constitution of the United States, and such fact shall be proclaimed by the President for the purpose of reimbursing the loyal citizens of said State, or such other purpose as said State may direct; and one-fourth shall also be paid over to said State as a fund to aid in the colonization or emigration from said State of any free person of African descent who may desire to remove therefrom to Hayti, Liberia, or any other tropical state or colony."

The Supreme Court of the United States, in the above case (104 U. S. 219, 220, 221), says that:

"We find nothing in the provisions of the act of 1862, above recited, which takes from the owner the right accorded him by the act of 1861, of applying for and receiving from the Treasury the surplus proceeds of the sale of his lands, nor anything inconsistent with that right.

But it is insisted by the appellant that sect. 12 of the act of 1862 makes a disposition of the surplus proceeds of land sold for taxes inconsistent with the right thereto claimed by the appellee.

That section declares that 'the proceeds of said leases and sales shall be paid into the Treasury of the United States, one-fourth of which shall be paid over to the governor of said State wherein said lands are situated, * * * when such insurrection shall be put down, * * * for the purpose of reimbursing the loyal citizens of said State or such other purposes as the State may direct; and one-fourth shall [also] be paid over to said State as a fund to aid in the colonization or emigration from said State of any free person of African descent who may desire to remove therefrom.'

On recurring to the preceding sections to ascertain what is meant by the words '*said leases and sales*,' the proceeds of which are to be so disposed of, we find that the first eight sections provide for the assessment of the direct tax upon the lands of the States *in insurrection*; for their forfeiture for non-payment of the tax; for their sale at auction; for their purchase by the United States, if no bid greater than the amount of the taxes, charges, &c., is received; and for their redemption by the owner. The act, beginning with sect. 9, then takes up a new subject, which is continued through sects. 10 and 11. They relate *exclusively* to the disposition to be made of the *lands bought by the United States at the tax-sales*. They authorize the commissioners, under certain circumstances, to lease them, or, under the direction of the President, instead of leasing, to cause them to be subdivided into parcels not to exceed three hundred and twenty acres, and sold. Sect. 12, which provides that the proceeds of '*said leases and sales*' shall be paid into the treasury, &c., *must, we think, be limited to the proceeds of the leases and sales authorized in the three next preceding sections*. Such is not only the natural and obvious, but also the grammatical, construction of the act.

That act provided for the collection of direct taxes in insurrectionary districts. It was not a confiscation act. It allowed the owner to redeem his lands within sixty days after the sale of them for taxes, and, while more stringent in its provisions, was not antagonistic to the previous legislation on the same subject.

Our opinion is, therefore, that the clause of the act of 1861, which allowed the owner of lands sold for taxes to apply for and receive the surplus proceeds remaining after payment of the taxes and charges, is not repealed by the act of 1862."

Nothing can be added to this clear language of the Supreme Court in arriving at a conclusion upon the questions presented.

Since the owner is entitled to the surplus proceeds of the *original sale* of lands in an *insurrectionary district* for direct taxes, "after satisfying the tax, costs, charges, and commissions," there is nothing left to be paid to "the governor of * * * [the] State wherein said lands are situated," or to the State. The provisions of section 12 of the act of June 7, 1862 (12 Stat., 425), requiring "that the proceeds of * * * sales shall be paid into the Treasury of the United States, one-fourth of which shall be paid over to the governor of said State, wherein said lands are situated, * * * and one-fourth shall also be paid over to said State," apply to the *proceeds of those sales made after the lands "shall have been struck off to the United States at * * * [the original tax-] sale"* (Act June 7, 1862—12 Stat., 424, Sec. 9). It follows, therefore, that the second question presented must be answered in the negative. See *United States v. Lawton* (110 U. S., 150).

The Supreme Court of the United States has thus settled, to whom, and to what extent, payments of the *proceeds of sales* of lands in *insurrectionary districts* for direct taxes may be made. The question remains, can such payments be now made without a further appropriation by Congress directly to that end?

Undoubtedly, under section 36 of the act of August 5, 1861, payments of the *surplus proceeds*, "after satisfying the tax, costs, charges, and commissions," of the *original tax-sales* of lands in "insurrectionary districts," and elsewhere, for direct taxes, may now be made to those persons, who were the *owners* of such lands at the time of the tax-sales, without any further action of Congress. But it has been held by the First Comptroller (Direct-Tax case, 3 Lawrence, Compt. Dec., 331, 345), that no portion of the proceeds of *those sales* of lands in "insurrectionary districts" for direct taxes, *made after* the lands were "struck off to the United States at * * * [the original tax-] sales," can now be paid, under section 12 of the act of June 7, 1862, either "to the governor of * * * [the] State wherein said lands are situated," or to the State; since said section "does not contain the usual, or any apt, words to make an appropriation," "was, in its nature and object, and from the necessities of war, designed to be temporary, and, not having been accepted by the States within the reasonable time evidently required, expired by its own limitation, before the war closed."

In support of this view, the difference of the language of the two sections—36 of the act of August 5, 1861, and 12 of the act of June 7, 1862; the former applying to the *surplus proceeds* of the *original tax-sales*; and the latter applying to the *proceeds* of *those sales made after* the lands were “struck off to the United States at said [original tax-] sales”—will be noticed.

Section 36 of the act of August 5, 1861, provides, that the *surplus proceeds* of the *original tax sale* “shall be paid to the owner of the property, or his legal representatives”; and that if he or they cannot be found, &c., “then such surplus shall be *deposited* in the Treasury of the United States, to be there held for the use of the owner or his legal representatives,” NOT UNTIL an appropriation to pay the same is made, but “until he or they shall make application therefor.”

This section, therefore, *first*, makes provision for direct payment “to the owner” or “his legal representatives,” and, *second*, “if he or they cannot be found,” &c., creates a trust-fund, of which the United States is trustee, and “the owner or his legal representatives” are *cestuis que trust*.

“The surplus of the proceeds” mentioned in said section cannot be said to be at any time in the Treasury, certainly as the money of the United States. Why, then, should an appropriation be necessary in order to pay out such surplus proceeds? The Supreme Court speaks of them, as “the money which the government held for him [the owner of the land at the time of the tax-sale] as his trustee” (*United States v. Taylor*, 104 U. S., 222), and also says, “that the surplus * * * must be regarded as being in the Treasury of the United States, under the provisions of section 36 of the act of 1861, for the use of the owner” (*United States v. Lawton*, 110 U. S., 149).

[But this question is now set at rest by the act of March 3, 1883 (22 Stat., 595), which appropriates money to pay the claims of original owners for surplus proceeds of direct tax-sales of lands under the act of August 5, 1861.]

Section 12 of the act of June 7, 1862, provides, “that the proceeds of said * * * sales,” meaning thereby sales made after the lands “shall have been struck off to the United States at * * * [the original tax-] sales,” “shall be *paid into the Treasury of the United States*, one-fourth of which shall be paid over to the Governor,”* &c., “and one-fourth shall also be paid over to said State,” &c.

Here no provision is made for direct payment to any third person, or for the creation of a trust-fund, as in section 36 of the act of August 5, 1861; but it is provided, “that the proceeds * * * shall be *paid*,” not “*deposited*,” “into the Treasury of the United States”: then follow provisions declaring what disposition *will be made by Congress* of this amount “*paid into the Treasury*,” IF certain conditions are performed.

* The deficiency act of July 7, 1884, appropriates \$60,375 98 to pay the Governor of South Carolina one-fourth of the proceeds of leases and sales under the act of June 7, 1862.

"No money [*'paid into'*] shall be drawn from the Treasury, but in consequence of Appropriations made by Law" (Const. U. S., Art. I, sec. 9, par. 7). It will hardly be contended, that the language of section 12 of the act of June 7, 1862, can be construed as making an appropriation (Direct-Tax Case, 3 Lawrence, Compt. Dec., 331).

And it has been shown, that no State perfected any right to receive money under this section (*Id.*, 341). Congress has recognized this view. (*Id.*, 339, *note*; *Id.*, 342). See act July 16, 1866 (14 Stat., 175).

It is, therefore, submitted that the above conclusions are supported by decisions of the Supreme Court of the United States, directly applicable, and by the language of the statutes themselves.

TREASURY DEPARTMENT,

First Comptroller's Office, February 6, 1884.

IN THE MATTER OF THE SETTLEMENT OF THE ACCOUNTS OF MARSHALS OF THE UNITED STATES AFTER THEY HAVE GONE OUT OF OFFICE.—EX-MARSHAL'S SETTLEMENT CASE.

1. A person who has been a marshal of the United States is required, upon the final settlement of his accounts, to furnish *evidence* that he has returned all process in which the United States is interested, and that he has accounted for all money of the United States which has come into his hands, before a balance will be certified in his favor by the First Comptroller. The certificate of the clerk of the proper court to the facts above mentioned is the evidence required.

The question is presented to the First Comptroller, to decide what evidence, if any, shall be required upon the settlement of final account of an ex-marshal of the United States, as to process in his hands at the expiration of his term.

DECISION BY WILLIAM LAWRENCE, *First Comptroller*.

Section 790 of the Revised Statutes provides that:

"Every marshal or his deputy, when removed from office, or when the term for which the marshal is appointed expires, shall have power, notwithstanding, to execute all such precepts as may be in their hands respectively at the time of such removal or expiration of office; and the marshal shall be held responsible for the delivery to his successor of all prisoners who may be in his custody at the time of his removal, or when the term for which he is appointed expires; and for that purpose he may retain such prisoners in his custody until his successor is appointed and duly qualified."

Under this section a person who has been a marshal may have in his hands (1) process on which the returns are due, and (2) other process yet to be executed. He may have received money for the United States on process of the class first mentioned, and may receive money for the

United States on process yet to be executed. It is obvious, that in the final settlement of his accounts, he should be required to present evidence that he has returned all process of both classes mentioned and accounted for all money received thereon. The accounts of an ex-marshal are rarely ever settled until *after the returns are due* on all process which has come into his hands.

Regulations have been adopted by authority of sections 377 and 379 of the Revised Statutes, under which reports are required to be made by marshals to the Solicitor of the Treasury.*

Section 3215 of the Revised Statutes provides:

"It shall be the duty of the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, to establish such regulations, not inconsistent with law, for the observance of revenue officers, district attorneys, and marshals, respecting suits arising under the internal-revenue laws in which the United States is a party, as may be deemed necessary for the just responsibility of those officers and the prompt collection of all revenues and debts due and accruing to the United States under such laws."

* The regulations prescribed July 15, 1877, are as follow :

MARSHALS.

1. On taking the oath of office and filing their official bonds, all Marshals will immediately advise the Solicitor of the Treasury by letter to that effect. They will each, at the earliest practicable period, obtain from their respective predecessors in office, the books and other property of the United States in their hands.

2. On the receipt of each process in United States cases, (except subpoenas,) Marshals will report the same to this office, stating the title and nature of the suit, the name of the process, and if an execution, distress warrant, or other writ requiring the collection of money, or the sale or seizure of property, the amount of the debt, or a description of the property to be sold or seized, and the amount of the costs, with the time from which they are directed to collect interest. They will also give to the United States Attorney duplicate receipts expressing the above particulars. (See Forms 2, 3, and 4, pp. 14 and 15.)

3. Where a Marshal, in a United States case, makes a seizure or a levy, he will report to the Solicitor a full description of the property seized or levied upon, in whose possession found, where, how, by whom, and upon what terms kept, and how long it will be necessary to keep it. If, at the time of sale, no one bids to the amount of the execution, or *one-half of the cash value of the property* offered, he will postpone the sale, and give notice to the Solicitor of the Treasury, except in cases where by such postponement the lien would be lost, or the interest of the Government otherwise seriously jeopardized. In the latter case, if he shall deem it necessary, to save the debt, he will consider the United States as bidding such amount, not greater than one-half the cash value of the property, as he shall deem proper for its interest. Should the United States become the purchaser of the property, the Marshal will take care of the same, and will make immediate report of his doings in relation thereto.

4. When real estate shall be purchased at a Marshal's sale by or for the United States, the Marshal will immediately transmit to this office his certificate of sale, according to the law and usages in his district; and when the purchaser shall be entitled thereto, such Marshal shall execute his deed for the property to the United States, and cause the same to be placed on record, and immediately thereafter he will transmit such deed to the Solicitor of the Treasury. If the real estate sold is not redeemed, he will immediately notify this office of the fact.

On the return of execution or order of sale, Marshals will report in writing to the

Under this section regulations have been prescribed relating to the duties of revenue officers, district attorneys and marshals.*

For a long period, ending about 1859, the information as to process, requisite to enable accounting officers to settle the accounts of ex-marshals, was obtained from the Solicitor of the Treasury, to whom marshals, clerks and attorney sof the United States had reported under the regulations mentioned. But more recently—since 1859—the usage has been (and it will be continued) to require them to furnish a certificate of the clerk of the proper court, showing the return of all process in which the Government is interested, and that all money of the United

United States Attorney, and also to the Solicitor of the Treasury, what they have done on each. In cases where the return is, in substance, "no property to be found," they will also specially report to those officers the situation, residence, and circumstances of the party against whom the process was issued, and whether the debtor has any means within or out of the district which can be reached by the United States, or whether the debt is valueless. (See Form 4, page 15.)

5. On receiving money in United States cases, Marshals will immediately report the same to the United States Attorney and to the Solicitor of the Treasury, fully and particularly stating when, from whom, and on what account the same was received.

6. All moneys collected by Marshals upon any process in favor of the United States, must be paid over by them to the proper authority as soon as practicable after the receipt by them of the same, and without any abatement or deduction on account of salary, fees, costs, charges, expenses, or claims of any description whatsoever, except the cost and expenses of collecting the execution; and for every such payment triplicate receipts will be taken, specifying the case in which the money has been received, and one of such receipts will at once be forwarded to this office.

This course is expressly required by section 3617 of the Revised Statutes.

7. In cases where fines, penalties, and forfeitures are incurred under the customs-revenue laws, and where the property seized is sold by the Marshal, or the fine or penalty collected by him, he will pay the balance to the Clerk or other proper officer, after deducting the proper charges allowed by the Court, as required by sections 3087 and 3090 of the Revised Statutes.

8. On the first day of October in each year, Marshals will report to the Solicitor the situation of all judgment debtors of the United States within their respective districts, so far as they have any knowledge upon the subject, and will advise such proceedings in the premises as they shall deem proper.

9. Marshals will give notice, in writing, to the United States Attorney of the proper district of all acts of trespass, and all breaches of the revenue or other laws, whereby pecuniary penalties in favor of the United States have been incurred by the wrongdoers, which shall come to the knowledge of such officer, or of which he shall be credibly informed, stating the particular act, with the time when committed, and the names of the witnesses, if known, and will immediately forward to this office a copy of such notice.

10. As most of the Marshals have salaries to compensate them for various miscellaneous services for which there are no statute fees, where other compensation is intended to be given for such services, it will be specially stated in the order directing the service.

11. These instructions must not be understood as applying to Internal Revenue cases, such cases not being under the control of this office.

12. Marshals will report as to all Post-Office cases, as required of United States Attorneys by paragraph 13, on page 7.

* See the Regulations, series 7, No. 12, 1880.

States collected by them has been paid into court or otherwise properly accounted for.*

Evidence will be required in accordance with the principles stated.

TREASURY DEPARTMENT,

First Comptroller's Office, February 13, 1884.

IN THE MATTER OF THE PAYMENT BY THE DISBURSING CLERK OF THE
STATE DEPARTMENT OF CONSULAR AND DIPLOMATIC DRAFTS DRAWN
ON THE SECRETARY OF STATE.—CONSULAR-DRAFT CASE.

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1. No usage, however long continued, can make that legal which is clearly contrary to express statute.
 2. In settling the accounts of consular and diplomatic officers, vouchers should be required in support of all payments made by them for which they ask credit.
 3. The act of June 20, 1874 (18 Stat., 90), does not repeal or modify any provision of law giving powers to, or imposing duties upon, accounting officers.
 4. The disbursing clerk of the Department of State has no lawful authority to pay drafts drawn by consular or diplomatic officers on the Secretary of State.
 5. Such drafts should be paid upon the requisition of the Secretary of State upon the Secretary of the Treasury, and by warrant of the latter officer countersigned by the First Comptroller.
 6. When a bonded officer of the United States is in arrears to the United States, suit on his bond is to be instituted under the direction of the First Comptroller.
 7. The effect, as evidence in court, of a balance certified by the First Comptroller against such officer, considered.

The Consular Regulations of 1881 contain these sections:

"500. The following separate accounts are to be transmitted to the Department of State, viz: Rent and miscellaneous account (Form No. 90);

* The form usually adopted is as follows :

UNITED STATES OF AMERICA,
District of New Jersey.

I, Linsly Rowe, clerk of the district court of the United States for the district of New Jersey, do hereby certify that all process issued out of the court to Robert L. Hutchinson, late a marshal of this district, [*the returns on which are due,*] have been returned; and that all money collected by said Robert L. Hutchinson, late marshal, in favor of the United States has been paid into court, or otherwise accounted for.

Witness my hand and official seal at Trenton in said District, this 25th day of August A. D. 1882.

[SEAL]

LINSLY ROWE,
Clerk.

When the certificate is given *after* all returns on process are due, the words in *italic* in the foregoing form should be *omitted*. The certificate does not cover process in which private suitors are interested, nor money collected for them. It will generally be assumed that they will take the necessary steps to secure proper returns and collect money. They have also a remedy on the marshal's bond. If, prior to the final settlement of an account, it should be represented to the accounting officers that a marshal was in arrears to a private suitor for money collected, it might furnish a reason for withholding payments to such marshal, with a view to protect the rights of the claimant, if practicable.

account for clerk hire; account for pay of persons employed, but not formally commissioned, as interpreters, guards, and other expenses in non-Christian countries; account for rent of prisons, wages of keepers, and other expenses, in China, Japan, Siam, Turkey, and other non-Christian countries; the account of fees received by marshals of consular courts and of the expenditures, to be supported by vouchers; account for expenses incurred in the arrest and transportation of persons charged with crime; account for expenses of acknowledging the services of masters and crews of foreign vessels in rescuing American citizens; and any account specially ordered by the Department of State.

"501. The following separate accounts are to be sent to the Fifth Auditor of the Treasury, viz: All accounts for salaries of consular officers, the amount of which is fixed by law; account for disbursements for the relief of seamen (Form No. 94); account of extra wages of seamen (Form No. 99); account-current (Form No. 100); any account specially ordered to be sent to the Treasury Department.

"530. Drafts for the following accounts are to be drawn upon the Secretary of State, viz: Rent and miscellaneous expenses; relief of seamen; clerk hire; expenses of interpreters, guards, and other expenses at Consulates in Turkey; rent of prisons; wages of keepers, care of offenders, and expenses incident thereto, in China, Japan, Siam, Turkey, and other non-Christian countries; expenses of the arrest and transportation of persons charged with crime; acknowledging the services of masters and crews of foreign vessels in rescuing American citizens from shipwreck; and any account specially ordered by the Department.

"531. Drafts for the following accounts should be drawn on the Secretary of the Treasury, viz: All salaries the amount of which is fixed by law; and any account specially ordered for the Treasury Department."

A usage has prevailed for a very long period, under which the disbursing clerk of the Department of State (Rev. Stat., 169, 173, 174, 176, 201; Act March 3, 1875—18 Stat., 349) has paid many of the drafts drawn by Consular Officers (Claims-Assignment Case, 3 Lawrence, Compt. Dec., 25). The drafts referred to have been those drawn for the payment of the following accounts: "rent and miscellaneous expenses; expenses incurred in the arrest and transportation of persons charged with crime; expenses of acknowledging the services of masters and crews of foreign vessels in rescuing American citizens" and, in rare cases, on account of expenditures by diplomatic officers under appropriations for "contingent expenses of foreign missions."* (See act February 26, 1883—22 Stat., 425.)

*The following is a specimen of the accounts rendered by a consul, and of his draft paid by the disbursing clerk.

[FORM NO. 90.]

RENT AND MISCELLANEOUS EXPENSE ACCOUNT.

Department of State, United States, to James W. Taylor, United States consul at Winnipeg, B. N. A., Dr.

1883.

June 30. For rent of consular office for quarter ending this day, as per voucher No. 1.....	\$75 00
For postage on official correspondence to and from this consulate for the quarter ending this day, per voucher No. 2, herewith transmitted	7 00

The usage has been to retain in these cases the vouchers in the Department of State, and to forward only the consul's account-current, with the draft annexed, to the Fifth Auditor, in support of the payment made of said draft by the disbursing clerk, as shown by *his* account-current with the United States, transmitted for settlement. In this mode, the account of the disbursing clerk has been settled by the First Comptroller, but the account of the consul has not been adjusted by the Auditor and Comptroller. The Fifth Auditor, in adjusting the accounts of the disbursing clerk, has disallowed payments thus made, and the question is thus presented to the First Comptroller to decide how and upon what evidence such drafts should be paid.

DECISION BY WILLIAM LAWRENCE, *First Comptroller.*

It is entirely clear, that in settling the accounts of consular and diplomatic officers, vouchers should be required in support of all payments made by them for which they ask credit.

The duty imposed by statute upon the accounting officers to adjust accounts, without any other statute on the subject, necessarily implies that they must require proper evidence that payments have been made (Rev. Stat., 269, 277). But it is not necessary to invoke *implied* authority. A statute expressly requires vouchers to be furnished (Rev. Stat.,

For stationery, as per vouchers Nos. 3, 4, 5, and 6.....	\$19 38
For freight and charges on boxes and packages to and from the Department of State, as per voucher No.	
For flag-staff and fixtures, as per voucher No.	
For flag, " " "	
For consular seal, " " "	
For consular press, " " "	
For consular arms, " " "	
For record books, " " "	
For binding consular letters, " " "	
For blank forms, as prescribed by the Department of State, vouchers Nos. 7 and 8	5 50
For loss by exchange on the amount of this account, say, \$106.88, at $\frac{1}{4}$ of 1 per cent., as per voucher No. 9.....	53
	<u>\$107 41</u>

Cr.

By fees remaining after payment of salary account	
By my draft on Secretary of State	\$107 41

JAS. W. TAYLOR,

U. S. Consul at Winnipeg, B. N. A.

N. B.—Be careful to sign this account and to transmit it at or before the time of making your draft.

1883, appropriation for contingent expenses of U. S. consulates, voucher No. 33, Jas. W. Taylor, consul, Winnipeg, B. N. A., 2d quarter, 1883, \$107.41.

Paid by check July 23, 1883.

Approved.

DEPARTMENT OF STATE.

W. HUNTER,

2nd Asst. Secretary.

3622). The Supreme Court has said that without vouchers "before the accounting officers there could not be any intelligent scrutiny of the claim, nor any decision which would be satisfactory to the claimant or to the public." (*Watkins v. United States*, 9 Wall., 764.) This subject was discussed in the Consular Accounts case (3 Lawrence, Compt. Dec. 349, 352).

The usage which has prevailed as to the mode of paying the consular drafts in question, and of settling the accounts of the disbursing clerk of the Department of State, is of very long standing. But it is well settled, that no usage, however long continued, can make that legal or proper which is clearly contrary to express statute (*United States v. Graham*, decided by the Supreme Court, January 20, 1884; *Floyd Acceptances*, 1 Ct. Cl., 270; *Broom*, Leg. Max., 7th ed., 684; *Hardcastle*, Statutory Law, 71).

The powers and duties of the disbursing clerk of the Department of State are similar to those of like officers in other Departments. The act of June 20, 1874 (18 Stat., 90), does not repeal or modify any provision of law giving powers to, or imposing duties upon, accounting officers, and hence the disbursing clerk of the Department of State has no authority, under said act, finally to settle any account. It very properly gives authority for supervision somewhat similar to that exercised by the Department of Justice and the courts over the accounts of marshals of the United States and clerks of courts, but the accounts are subject

No. —.

\$107.41 gold.

CONSULATE UNITED STATES OF AMERICA AT WINNIPEG, B. N. A.,

July 12, 1883.

Fifteen days after sight (acceptance waived and endorsements by procuration excepted) of this first of exchange pay to the order of D. Miller, manager Merchants Bank of Canada at Winnipeg, B. N. A., one hundred and seven $\frac{41}{100}$ in gold coin, value received, and charge the same to account for rent and miscellaneous expenses of consulate for quarter ending June 30, 1883.

JAMES W. TAYLOR,

Consul.

To the SECRETARY OF STATE,

Washington, D. C.

(Stamped right-hand upper margin :) Received Dept. of State, July 17, 1883.

(Stamped right-hand lower margin :) Consulate of the United States, Winnipeg, B. N. A.

(Across the face :) Winnipeg, R. 43.

Indorsed as follows:

Pay to the order of the Bank of New York, N. B. A., on account of Merchants' Bank of Canada, Winnipeg.

JOHN C. MORE,

Manager.

Pay Sec. of State, Washington, D. C., or order, for acct. of Bank of New York, N. B. A.

CHAS. OLNEY,

A. Cash.

to the final revision of the proper accounting officers of the Treasury Department (1 Lawrence, *Compt. Dec.*, 2d ed., App., ch. i, p. 415; *Id.*, ch. xii, p. 542; subpoena case, 2 *Id.*, 2d ed., 287, 294, 297; Evans's case, 3 *Id.*, 114; Election-Supervisors' case, *Id.*, 153). The disbursements which may be lawfully made by the disbursing clerk of the Department of State are similar in their nature and character to those made by disbursing clerks in the other Executive Departments; being such as are necessary and proper for the business of the Department at Washington City, and which could not be conveniently made by any other person. Under the appropriation for "contingent expenses of United States consulates," the disbursements made by the disbursing clerk of the Department of State should be confined exclusively to expenditures made by himself, under the approval and authority of the Secretary of State, for purchases and supplies, such as stationery, seals, presses, stamps, books, maps, flags, etc., for the use of United States consular officers, freight charges, cost of making packing boxes, publishing death notices, and expenditures of like nature incurred in the United States, and coming properly under said appropriation (Rev. Stat., 1748).

All accounts, without exception, of United States consular officers, for disbursements made or expenses incurred by them under the appropriation for "contingent expenses of United States consulates," should, after examination and approval by the Department of State, be transmitted to the Treasury Department for adjustment, and the drafts of such consular officers for balances due them on such accounts should, in all cases, be paid by requisition of the Secretary of State upon the Secretary of the Treasury. The payment of such drafts by the disbursing clerk of the Department of State is without authority of law, and the settlement in any other Department than the Treasury of the accounts on which such drafts are based, is contrary to the plain and imperative requirements of the statute.

The foregoing propositions are supported by several considerations:

I. It is impossible for the First Comptroller to perform the duties required of him by law of adjusting consular and diplomatic accounts, under any other mode than the one above mentioned.

The Revised Statutes provide as follows:

"SEC. 1697. Every consul-general, consul, and commercial agent, before he receives his commission or enters upon the duties of his office, shall give a bond to the United States, with such sureties, who shall be permanent residents of the United States, as the Secretary of State shall approve in a penal sum not less than one thousand dollars, and in no case less than the annual compensation allowed to such officer, and not more than ten thousand dollars, and in such form as the President shall prescribe, conditioned for the true and faithful accounting for, paying over, and delivering up of all fees, moneys, goods, effects, books, records, papers, and other property which shall come to his hands, or to the hands of any other person to his use as such consul-general, consul, or commercial agent, under any law now or hereafter enacted; and for the

true and faithful performance of all other duties now or hereafter lawfully imposed upon him as such consul-general, consul, or commercial agent. The bonds herein mentioned shall be deposited with the Secretary of the Treasury.

"SEC. 1698. Every vice-consul shall, before he enters on the execution of his trust, give bond, with such sureties as shall be approved by the Secretary of State, in a sum of not less than two thousand nor more than ten thousand dollars, conditioned for the true and faithful discharge of the duties of his office according to law, and for truly accounting for all moneys, goods, and effects which may come into his possession by virtue of his office. The bond shall be lodged in the office of the Secretary of the Treasury."

The Consular Regulations prescribed by the President through the Secretary of State, "for the information and government of consular officers of the United States," require that such officers shall render *their accounts with the United States* quarterly, under the proper heads and appropriations (Consular Regulations, 1881, Art. XXVI). On these accounts, after they have been adjusted at the Treasury in accordance with the provisions of the law, such consular officers and the sureties on their official bonds, are responsible for balances certified by the First Comptroller to be due from such officers to the United States. The statute prescribes the means by which the United States may secure a remedy against consular officers and their sureties.

Section 269 of the Revised Statutes makes it the duty of the First Comptroller—

"To superintend the recovery of all debts certified by him to be due to the United States, and for that purpose to direct all such suits and legal proceedings, and to take such measures as may be authorized by law, and are adapted to enforce prompt payment thereof."

Section 3624 of the Revised Statutes provides that:

"Whenever any person accountable for public money, neglects or refuses to pay into the Treasury the sum or balance reported to be due to the United States, upon the adjustment of his account, the First Comptroller of the Treasury shall institute suit for the recovery of the same, adding to the sum stated to be due on such account, the commissions of the delinquent, which shall be forfeited in every instance where suit is commenced and judgment obtained thereon, and an interest of six per centum per annum, from the time of receiving the money until it shall be repaid into the Treasury." (U. S. v. Gaussen, 19 Wall., 198.)

Section 3633 of the Revised Statutes enacts:

"Whenever any officer employed in the civil, military, or naval service of the Government, to disburse the public money appropriated for those branches of the public service, respectively, fails to render his accounts, or to pay over, in the manner and in the times required by law, or by the regulations of the Department to which he is accountable, any sum of money remaining in his hands, it shall be the duty of the First or Second Comptroller of the Treasury, as the case may be, who shall be charged with the revision of the accounts of such officer, to cause to be stated and certified the account of such delinquent officer to the Solicitor of the Treasury, who is hereby authorized and required immediately

to proceed against such delinquent officer, in the manner directed in the six preceding sections."

In order that the First Comptroller may be enabled to discharge the duties required of him by the foregoing provisions of law, and to institute suit on behalf of the United States, as therein required, it is necessary:

1. That the accounts rendered by any officer of the United States, against whom, or his sureties, suit is to be brought, shall have been adjusted at the Treasury and certified by the First Comptroller to the Register of the Treasury.

2. That the balances found due on such accounts and certified by the First Comptroller, shall have been duly entered on the books of the Treasury kept by the Register.

3. That a duly authenticated transcript of such accounts shall have been prepared and certified to the Solicitor of the Treasury, who superintends and directs the prosecution of the suit. The Solicitor of the Treasury *must have* a certified copy of the account of the consul, as settled by the accounting officers in the Treasury Department (Rev. Stat., 886; see also secs. 882, 884, 887; *United States v. Pinson* 102, U. S., 548; McKnight's case, 13 Ct. Cl., 292; McKee's case, 12 *Id.*, 504, 553; McCann's case, 18 *Id.*, 445; Clyde's case, 13 Wall, 38; 14 Op. Att. Gen., 615; *United States v. Hunt*, 105 U. S., 183; Malakof Bitters case, 3 Lawrence, Compt. Dec., 136, *note*; Gillis's case, 95 U. S., 407). These cases discuss the effect of the Comptroller's certified balance as an item of evidence in courts. The disbursing clerk in the State Department cannot settle the account, and if he could do so, no provision is made for certifying it for suit.

It is manifest, therefore, that no suit can be properly brought, or successfully prosecuted, in cases where the accounts of an officer of the Government, or any portion or particular class of such accounts, have never been adjusted at the Treasury as required by law, but have been paid and settled in some other Department. *

II. Section 191 of the Revised Statutes provides that:

"The balances which may from time to time be stated by the Auditor and certified to the heads of Departments by the Commissioner of Customs, or the Comptrollers of the Treasury, upon the settlement of public accounts, shall not be subject to be changed or modified by the heads of Departments, but shall be conclusive upon the Executive branch of the Government, and be subject to revision only by Congress, or the proper courts."

In the case of Diplomatic and Consular officers of the United States, no balances on their accounts whether due to or from the United States, can be officially and authoritatively ascertained, until such accounts

* See MS. letter of the First Comptroller of January 19, 1882, to the Solicitor of the Treasury, in the case of George W. Driggs, late U. S. Commercial Agent at Hull; and the MS. letter of the Solicitor dated January 21, 1882, to the Secretary of State in the same case; also Consular-Accounts case, 3 Lawrence, Compt. Dec., 352, 353.

have been stated by the Fifth Auditor, and certified by the First Comptroller to the Register of the Treasury, by whom they are officially recorded. The audit of such accounts in another Department of the Government is not conclusive upon the accounting officers of the Treasury; and payments made by the disbursing clerk of the Department of State upon the audit of such accounts in the Bureau of Accounts of the Department of State, and charged in his accounts, are subject to revision and disallowance in the settlement of his accounts by the accounting officers, or to suspension for proper cause. Hence, it will be for the protection of the disbursing clerk of the Department of State to avoid payment of such accounts, and in every instance, to let the drafts based thereon be paid by requisition of the Secretary of State upon the Secretary of the Treasury, and to refer the accounts to the Fifth Auditor of the Treasury for adjustment.

III. The provisions of law requiring the settlement at the Treasury Department of all accounts in which the United States are concerned, either as debtors or as creditors, are so broad and specific, that no accounts of any officers of the Government can be excluded from its provisions, except in cases where Congress shall specifically make an exception. No such exception has been made in the case of the accounts, or any portion of the accounts, of Diplomatic and Consular officers of the United States.

Section 236 of the Revised Statutes enacts :

"All claims and demands whatever by the United States or against them, and all accounts whatever in which the United States are concerned, either as debtors or as creditors, shall be settled and adjusted in the Department of the Treasury."

IV. Section 277 of the Revised Statutes provides that "The Fifth Auditor shall receive and examine all accounts accruing in or relative to the Department of State." (See Rev. Stat., 271.) That this provision includes the accounts of all Diplomatic and Consular officers of the United States cannot admit of a reasonable doubt. And no fair or reasonable construction of this provision would authorize a portion of such accounts to be retained and settled in the Department of State, while the remainder are transmitted to the Fifth Auditor. "*All accounts accruing in or relative to the Department of State,*" are to be received and examined by the Fifth Auditor. The specific provisions of this section (277) taken in connection with the broader and more general requirements of section 236, above quoted, leave no room for uncertainty or doubt. All accounts of Diplomatic and Consular officers of the United States, (including those specified in section 500 of the Consular Regulations, "to be transmitted to the Department of State,") are required by law to be adjusted and settled at the Treasury Department, by the Fifth Auditor and First Comptroller.

V. The practice that has prevailed as to the payment of certain accounts of Diplomatic and Consular officers of the United States by the disbursing clerk of the Department of State, and the settlement of such

accounts in the Bureau of Accounts of the Department, is objectionable not only because contrary to the provisions of the law, as shown, but also because attended with much confusion and perplexity to the accounting officers. It renders the books and records of the Treasury Department incomplete and imperfect, in that they do not show all the payments and allowances that have been made, there being no record whatever of such accounts as are paid and settled in the Department of State by the disbursing clerk. When questions arise, as they frequently do, after the lapse of some time, whether the accounts of contingent expenses of a certain consular officer for some stated period have been settled and allowed, they can be determined almost immediately if the accounts have been adjusted at the Treasury Department; but if they have been paid and settled at the Department of State, and included in the account of the disbursing clerk, the facts can be ascertained only by overhauling and examining the accounts and vouchers of the disbursing clerk on file in the Treasury Department. There is also the danger of a duplicate allowance of the same account, once at the Department of State, and again at the Treasury. Such cases are liable to occur, as Consular officers render their accounts and vouchers in duplicate, and a few instances of this kind have been detected and corrected at this Department.

VI. The settlement of these accounts by the First Comptroller is required by the policy and objects of section 1766 of the Revised Statutes and the act of March 3, 1875 (18 Stat., 481). These secure to the United States the right to set off any sum due to it from any claimant against any balance due to him from the United States, and this can only be done by the settlement of an account in the Treasury Department (Georgia case, 4 Lawrence, Compt. Dec., 359).

VII. This mode of settling and paying Consular and Diplomatic accounts is recognized, if not required, by usages based on the analogy of statutory provisions relating to other accounts. Thus, section 273 of the Revised Statutes provides that:

"It shall be the duty of the Second Comptroller:

First. To examine all accounts settled by the Second, Third, and Fourth Auditors, and certify the balances arising thereon to the Secretary of the Department in which the expenditure has been incurred.

Second. To countersign all warrants drawn by the Secretaries of War and of the Navy, which shall be warranted by law."

The word "warrants" in the clause last above quoted means "*requisitions*." (Bender's case, 1 Lawrence, Compt. Dec., 2d ed., 338; 15 Op. Att.-Gen., 195; McKnight's case, 13 Ct. Cl., 292; McKee's case, 12 *Id.*, 504, 553.) To secure the payment of balances so certified and other payments the Revised Statutes provide:

"SEC. 3673. All moneys appropriated for the use of the War and Navy Departments shall be drawn from the Treasury, by warrants of the Secretary of the Treasury, upon the requisitions of the Secretaries of those Departments, respectively, countersigned by the Second Comptroller of the Treasury, and registered by the proper Auditor.

"SEC. 3674. Payments of money out of the Treasury on account of the postal service shall be in pursuance of appropriations made by law, by warrants of the Postmaster-General, registered and countersigned by the Auditor for the Post-Office Department, and expressing on their face the appropriation to which they should be charged.

"SEC. 3675. All warrants drawn by the Secretary of the Treasury, upon the Treasurer of the United States, shall specify the particular appropriation to which the same should be charged; and the moneys paid by virtue of such warrants shall, in conformity therewith, be charged to such appropriation in the books of the Secretary, First Comptroller, and Register.

"SEC. 3676. All appropriations for specific, general, and contingent expenses of the Navy Department shall be under the control and expended by the direction of the Secretary of the Navy, and the appropriation for each Bureau shall be kept separate in the Treasury."

There is no specific provision for a requisition from the Secretary of State to pay Consular or Diplomatic drafts, but the usage has been long continued to make them, and on these the Secretary of the Treasury issues warrants for payment, which are countersigned by the First Comptroller, and the proper entry is made on the books of the Register of the Treasury—charging the Diplomatic or Consular officers, under the proper appropriation, with the amount of his draft so paid.*

In settling the accounts of a Consular or Diplomatic officer, in the office of the First Comptroller, he is debited with the amount so charged against him upon the certificate of the Register of the Treasury, which is filed with the account. By referring all accounts of Diplomatic and Consular officers to the Fifth Auditor for settlement, after examination and approval by the Department of State, and by paying the drafts drawn against such accounts by requisitions of the Secretary of State upon the Secretary of the Treasury, the anomalous and unsatisfactory practice which has heretofore prevailed will be avoided, while the supervision of the Secretary of State over such accounts, so far as relates to preliminary examination and approval, will be in no wise curtailed. It is not doubted that drafts of any Consular or Diplomatic officer may be paid only on a balance certified in his favor by the First Comptroller

* The following is a specimen of a requisition:

To the Secretary of the Treasury:

No. 3673.

DEPARTMENT OF STATE,
Washington, February 14, 1884.

SIR: Please cause a warrant for twenty-one ⁷⁰⁰/₁₀₀ dollars to be issued in favor of Riggs & Co., bankers, Washington, D. C., holders of the annexed draft of M. A. Ledet, United States Consul at Tuxpan, dated Dec. 31, 1883, payable out of the under-named appropriation. "Contingent Expenses United States Consulates," 1884. The said M. A. Ledet to be charged accordingly on the books of the Treasury.

\$21 ⁷⁰⁰/₁₀₀.

FREDK. T. FRELINGHUYSEN,
Secretary of State.

(Stamped:) Comptroller's Office, Diplomatic and Consular Division, Feb. 14, 1884.

on the settlement of an account. But the mode of paying on the requisition of the Secretary of State is attended with decided advantages, and could not safely be changed.

It is evident that the disbursing clerks in the executive departments are only authorized to pay the salaries and compensation of officers and employes in their respective departments, and such expenses as may be incident to the internal administration thereof (Rev. Stat. 169, 173, 174, 176, 193, 201). It has never been supposed that the disbursing clerk in the Treasury Department could pay the salaries of officers acting in connection with the service of the Department all over the United States, yet if he can pay expenses outside of its internal administration, it will be difficult to fix the limit of his authority. And no disbursing officer should, as a general rule, pay either (1) a bonded officer who receives money for which he is required to account to the United States, and for which he might be in arrears and liable to action therefor, or (2) any contractor, whether bonded or otherwise, who in the settlement of his accounts might be in arrears and liable to an action of the United States to recover money.

Usages which have been long continued should not be changed, except to promote the public interests, and on account of clear necessity. The change now made is justified and required upon the grounds stated. Hereafter payments made by the disbursing clerk of the Department of State, of Consular and Diplomatic drafts, cannot be allowed in the settlement of his disbursing accounts.

TREASURY DEPARTMENT,

First Comptroller's Office, February 15, 1884.

IN THE MATTER OF THE RIGHT OF A MEMBER OF THE HOUSE OF REPRESENTATIVES TO RECEIVE, AT ANY TIME HE MAY ELECT DURING A SESSION OF CONGRESS, THE WHOLE AMOUNT OF THE "COMMUTATION" PROVIDED FOR HIM BY STATUTE, IN LIEU OF STATIONERY.—STATIONERY-COMMUTATION CASE.

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1. It is the right of a member of the House of Representatives to require payment at any time during a session of Congress of the full amount of money to which he is entitled by statute as commutation in lieu of stationery.

February 4, 1884, the Clerk of the House of Representatives addressed a letter to the First Comptroller, in which he says:

"Several Members of the House have requested a settlement of their stationery accounts for the present session of Congress. A doubt has arisen whether a Member has the right to close his stationery account and receive the balance that may be due him as commutation on any day prior to the close of a session. This question is respectfully submitted for your decision."

DECISION BY WILLIAM LAWRENCE, *First Comptroller.*

The statute gives to each Senator or Representative in Congress a right to receive "for any one session of Congress" either "stationery, or commutation therefor" not exceeding one hundred and twenty-five dollars (Act February 12, 1868, 15 Stat., 35; Rev. Stat., 43; act January 20, 1874, 18 Stat., 4; act March 3, 1883, 22 Stat., 536; Commutation case, 2 Lawrence, Compt. Dec., 2d ed., 64). It has been decided that "the law neither makes nor knows any fraction [of a session] for commutation." (Commutation case, 2 Lawrence, Compt. Dec., 2d ed., 64).

The Rules of the House make it the duty of the Clerk to "keep the stationery accounts of Members and Delegates and pay them as provided by law." (Rule 3 of House, 2 Sess. 46th Cong.; Rule 3 of House. 1st Sess. 48th Cong.; Digest and Rules, 184). The statute provides the mode of purchasing stationery for the use of Representatives (Act August 26, 1842, 5 Stat., 526, sec. 17; Act June 20, 1874, 18 Stat., 4; House Resolution, July 24, 1868, Journal, 2, 40 p., 1173; Smith's Manual and Digest, 2 Sess. 46th Cong., 359; Manual and Digest, 1st Sess. 48th Cong., 388).

It is the right of a Representative to elect whether he will receive stationery purchased under an appropriation for that purpose (Act March 3, 1883, 22 Stat., 536), or a commutation in money therefor. The evident purpose of giving this election is that Representatives may be supplied with stationery furnished either by the Clerk, or by themselves, according to their own discretion and judgment. No law or rule apportioned either stationery or commutation therefor to any month, or period of time, except *for a session as an entirety*. In the absence of any law or rule as to apportionment, it is manifestly impracticable to make any. One month may require much more stationery than another. It is the right of each Representative to provide a supply for the entire session, if he elect to do so. Certainly no law or rule has required him to purchase a supply for a month or other fractional part of a session. If his commutation may be divided into monthly installments, it may with equal authority be divided into weekly or daily allowances. There is no authority for making any division or fractional allowance. By express statute the "commutation" is \$125 "for any one session of Congress." The right to it does not arise until a session commences, and then the right to the whole amount arises. There is no mode of determining how long a session will last, and hence any apportionment is impracticable. A session *may* terminate in a day, a week, a month, or a longer period. If it be said that the commutation should be paid at the end of the session, the answer is that the law gives the commutation to supply a want felt during a session, and perhaps also during the term of a Representative. The chief necessity is during a session. If payment be withheld until the close of a session, the main purpose of the commutation is defeated. If it may be so withheld, it may, with equal propriety, be withheld until the close of a term. The language of the

statute, its evident purpose, and the common understanding derived from the rules of the House and general usage, require the construction that when a session has commenced, each Representative may, in his discretion, elect to take stationery as he needs it, or the commutation of \$125 therefor, for that session. It has been suggested that section 3648 of the Revised Statutes in some way prohibits such payment, but it has not the remotest connection with the subject.

The Clerk of the House will be advised accordingly.

TREASURY DEPARTMENT,

First Comptroller's Office, February 22, 1884.

IN THE MATTER OF THE RIGHT OF POSTMASTERS OF THE FOURTH CLASS, TO CLAIM MORE THAN A *PRO RATA* COMPENSATION FOR A FRACTIONAL PART OF A QUARTER.—COLLINS'S APPEAL.

1. Under the act of March 3, 1883 (22 Stat., 602, sec. 2), postmasters of the fourth class, who go out of office before the end of a quarter, can be allowed as maximum compensation an amount for the number of days served, estimated at the rate of two hundred and fifty dollars per quarter.
2. The compensation provided in the act attaches to the office, not to the officer.
3. *United States v. Pearce et al.*; *United States v. McCarty*; *United States v. Edwards* examined and distinguished from this case.
4. The data for computing the amount of compensation for any fractional part of the year are (in case of commissions), *the time of service*, and the amount received or disbursed.
5. The general rule now is, that all officers of the United States entitled to a yearly compensation, shall receive, when superseded within the year, a *pro rata* compensation. *United States v. Wendell et al.*; and *Hoyt v. United States*, followed.

The quarter year of postal service ended June 30, 1883, contained 91 days, of which John W. Collins served 51 days as a postmaster of the fourth class at Kinston, Lenoir County, North Carolina, from April 1, to May 21, inclusive, and his successor served the residue of the quarter. The Auditor of the Treasury for the Post Office Department settled the account for the quarter on the basis of the following statement:

Compensation due Collins for first 51 days.	
\$50 at 100 per cent.....	\$50.00
100 at 60 per cent.....	60.00
105.82 at 50 per cent.....	52.91
Box rent collected.....	48.50
Total commission and box rent.....	211.41
Deduct amount in excess of 51-91 of \$250.....	71.30
Amount of salary allowed for 51 days' service in 2d quarter 1883.....	140.11
Compensation due successor of Collins for second 40 days:	
\$50 at 100 per cent.....	\$50.00

100 at 60 per cent	\$60.00
22.22 at 50 per cent	11.11
Total commission	121.11
Deduct amount in excess of 40-91 of \$250	11.22
Amount of salary allowed for 40 days service in 2d quarter 1883	109.89
Total salary allowed for the entire quarter.....	250.00

From this settlement Collins appealed to the First Comptroller.

Collins insists that he should be allowed credit for *all* the box rent collected by himself, and commission on stamps canceled, &c., up to the time of his leaving office and that his successor should begin where "he left off."

He says "my successor collected no box rents during the second quarter of 1883, and only \$94.18 out of the first \$350 of that quarter 'actually mailed' after he took charge, for which he could make a 'sworn quarterly return'. My account current for the first part of the quarter shows amount of canceled stamps \$255.82. I claim commission on this amount, on the first \$50, one hundred per cent., \$50; on the next \$100, sixty per cent., \$60; on that portion of the next \$200 coming within my term, being \$105.82, fifty per cent., \$52.91; and box rents collected by myself \$48.50, making whole amount of my compensation \$211.41. My successor canceled stamps amounting to \$248.22 during the remainder of the quarter. The whole compensation for the entire quarter is \$250."

DECISION BY WILLIAM LAWRENCE, *First Comptroller*.

The act of March 3, 1883 (22 Stat., 602, Sec. 2), contains the following provisions:—

"The compensation of postmasters of the fourth class shall be fixed upon the basis of the whole of the box-rents collected at their offices and commissions upon the amount of canceled postage-due stamps (provided for in section two hundred and seventy of the Revised Laws and regulations, edition of eighteen hundred and seventy-nine), and on postage stamps, official stamps, stamped envelopes, postal cards, and newspaper and periodical stamps canceled on matter actually mailed at their offices, and on amounts received from waste paper, dead newspapers, printed matter, and twine sold, at the following rates, namely: On the first fifty dollars or less per quarter, one hundred per centum; on the next one hundred dollars or less per quarter, sixty per centum; on the next two hundred dollars or less per quarter, fifty per centum; and on all the balance, forty per centum, the same to be ascertained and allowed by the Auditor of the Treasury for the Post-Office Department in the settlement of the accounts of such postmasters upon their sworn quarterly returns: *Provided*, that when the compensation of any postmaster of this class shall reach two hundred and fifty dollars for four consecutive quarters each, exclusive of commissions on money-order business, and when the returns to the auditor for four consecutive quarters shall show him to be entitled to a compensation in excess of two hundred and fifty dollars per quarter, the auditor shall report such fact to the

Postmaster-General, who shall assign the office to its proper class, and fix the salary of the postmaster as provided by section one of this act: *Provided further*, That in no case shall there be allowed to any postmaster of this class a compensation greater than two hundred and fifty dollars in any one of the first three quarters of any fiscal year, exclusive of money-order commissions, and in the last quarter of each fiscal year there shall be allowed such further sum as he may be entitled to under the provisions of this act, not exceeding for the whole fiscal year the sum of one thousand dollars, exclusive of money-order commissions."

The act very clearly states the source, the rate, and the limit of the compensation to which postmasters of the fourth class are entitled.

1. They are to receive:

- (1) The whole of the box rent collected at their offices.
- (2) (a) *Commissions* upon the amount of stamps of various kinds, and upon postal cards, canceled on matter actually mailed at their offices.
- (b) *Commissions* upon the amounts received from the sale of waste paper, dead newspapers, printed matter, and twine.

2. The following rate of commission is allowed:

- (1) One hundred per centum on the first fifty dollars or less per quarter.
- (2) Sixty, on the next one hundred dollars or less per quarter.
- (3) Fifty, on the next two hundred dollars or less per quarter.
- (4) Forty, on all the balance.

3. The following limit is set to their compensation:

- (1) *In no case* shall a greater compensation be allowed in any of the *first three quarters* of any fiscal year than two hundred and fifty dollars (exclusive of money-order commissions).
- (2) *In the last quarter* of each *fiscal year* more than two hundred and fifty dollars may be allowed, provided it is such an amount as will not cause the compensation for the whole fiscal year to exceed one thousand dollars, exclusive of money-order commissions.

There can be, under this act, no difficulty in the settlement of the account of a postmaster of the fourth class whose services extend over an entire quarter or an entire fiscal year. There is clear internal evidence that when the act was framed, Congress had in view the mode of keeping accounts in the Treasury Department. But, on account of the nature of the source of the compensation provided, perplexity may arise when an account is to be adjusted for the fractional part of a quarter. A postmaster of this class can *in no case* receive more than two hundred and fifty dollars in any one of the first three quarters of any fiscal year. But the question is, can he receive that amount for a fractional part of a quarter? Or, to state the question somewhat more precisely, can he, whenever he retires from office during a quarter, claim whatever he may have made by commissions, &c., not in excess of two hundred and fifty dollars, or can he claim as his highest compensation only *at the rate of* two hundred and fifty dollars a quarter?

The discussion of this question will necessarily involve the determination of another one; that is, whether the compensation provided in the act is attached to a particular officer for his services for any length of time, or to the office itself for a fiscal year, or for the several quarters thereof as distinct entireties.

There have been cases bearing some resemblance to this, in which it has been decided that an officer, compensated by commissions, is entitled to all he has earned up to the time of the determination of his services, though that be in the midst of a quarter, and his successor is entitled to what *he* earns, no *pro rata* apportionment being made according to their respective terms of service. It has been held in these cases that the various acts under which compensation was claimed, attached the compensation to the particular individuals holding the office, and not to the office itself. A review of them will show to what extent they are distinguished from this case. In *United States v. Pearce et al.* (2 Sumn., C. C. 575), decided in 1837, *per* Story, J., under an act which provided as compensation for collectors of customs, the fees arising in certain specified ways, and from percentages on moneys received by them on account of duties, &c., not to exceed \$3,000 per annum, it was held that a collector who receives, while in office, the fees and emoluments of his office, not exceeding \$3000, is absolutely entitled to them in his own right, whether he continues in office during the whole year or not.

It was contended in the argument that the \$3,000 was intended as the maximum compensation for the services of the collector for the whole year; and that, consequently, if he serves only for a part of the year, he is entitled only to a compensation *pro rata* for the period, less than a year, of his services. The court, assuming the first branch of this argument to be true in a general sense, saw nothing in the statute to sustain the latter dependent branch.

Under a law which allowed receivers of public moneys one per cent. on the amount received, but limiting the allowance to \$2,500 per annum, and allowing in addition a salary of \$500 per annum, it was held:

First. That the salary could be graduated quarterly, but that the per centum could not be.

Second. That the commission should be paid quarterly as it arises, and this payment cannot be refused by the Treasury Department, because the whole amount accrues the two first quarters of the year (*United States v. McCarty*, 1838, 1 McLean, 306).

In the case just cited, McCarty resigned six months before his term of office closed, having received an amount, which, at the per cent. allowed, gave him the sum of \$2,500. It was considered positive injustice to allow him but half that sum. In both of the cases mentioned, it was declared that the words of the acts controlling the decisions required the successor's year to begin with the day of his appointment, and that he was not to be regarded as filling a vacancy.

In another similar case the court said: "The salary is paid quarterly, and is limited to the time the service is performed. But the commissions depend not on the time of service, but on the amount of money received. And how this allowance in the present case [defendant having ceased to be receiver at the end of six months of the year in which his term of office expired] can be graduated so as to pay the defendant only the sum of twelve hundred and fifty dollars, when the law allows him twenty-five hundred dollars, it is not easy to see." (*United States v. Edwards et al.*, 1 McLean, 467.)

Story, J., in a similar case, decided in 1841 (*United States v. Dickson*, 15 Pet., 141), held that a receiver was entitled to calculate his yearly commission on the amount of public money received by him during a year, commencing from the date of his appointment, instead of calculating it by the fiscal year, and that he had a right to charge the whole yearly maximum of commissions, for the fractional portion of the year in which he resigned.

It is firmly established by these decisions that when an act grants compensation to an officer to be derived from commissions, the compensation not to exceed a prescribed sum per annum, the officer is entitled to the commission earned by him (not exceeding such maximum), during the year, which begins with the day of his appointment, though he does not continue in the office for the whole year.

This rule has, however, been to a great extent changed by express law. Since the case of *United States v. Pearce et al.*, *supra*, was decided, the act of February 11, 1846 (9 Stat., 3), has provided that collectors and all other officers of the customs, serving for a less period than one year, shall not be paid for the entire year, but shall be allowed in no case more than a *pro rata* of the maximum compensation of said officers respectively, for the time only which they actually serve.

It is said in the *United States v. Wendell et al.*, 1864 (2 Cliff, C. C., 349):

"The *time of service* and the amount disbursed, are the data for computing the amount of compensation for any fractional part of the year, because the maximum being based on an entire calendar year, the proportion of it due to the officer, if earned can only be determined by ascertaining the proportion of the year which has elapsed. Where officers of the United States, entitled to a yearly compensation are superseded within the year, the *general rule* is that they are entitled to a *pro rata* compensation. Reference is made * * * to the case of *United States v. Dickson*, 15 Pet., 141, where a different rule was applied, but in the judgment of this court, the rule there prescribed is not applicable to this case.

The *contrary rule* is the correct one in the settlement of accounts with collectors and all other revenue officers, and with ambassadors and ministers plenipotentiary, and, perhaps, at the present day with all other persons holding office under the Federal Government. 9 Stat., 3; 11 *Id.*, 52."

Even if it be not true, that at present the rule of *pro rata* compensation is applicable to all persons holding office under the Government, it may be said that any other rule cannot be applied, except in cases where the compensation provided does not make the office virtually a salaried

one. (*Hoyt v. United States*, 10 How., 143.) It was said in *Hoyt v. United States*, that the act of 1838, which provided for the compensation of the collector for the year, made it virtually a salaried office, with the addition of his share of the fines, penalties, and forfeitures, and it was, therefore, held that the *pro rata* allowance for the portion of the year the defendant held an office was all that could be legally claimed.

It is difficult to see any difference in principle between that case and the one under consideration, in respect to compensation to be allowed, and upon its authority and upon that of *United States v. Wendell et al.*, *supra*, it must be determined.

Under the act of March 3, 1883 (22 Stat., 602, sec. 2), a postmaster of the fourth class is entitled to a maximum compensation of \$1,000, not for an *official*, but for a *fiscal* year.

Accounting days, dividing each year into four quarters, and commencing and terminating the fiscal year on the first day of January and the 31st day of December, existed from the formation of the Government. (*United States v. Dickson*, 15 Pet., 144.)

An act was passed August 26, 1842, defining the fiscal year of the Treasury to commence on the first day of July in each year and terminate on the thirtieth day of June of the succeeding year (5 Stat., 536, 537; Rev. Stat., 237).

As has been already stated, the act of March 3, 1883, appears to have been framed with reference to the manner in which accounts are kept in the Treasury Department. By its terms, a further allowance of a specified sum may be made in the *last quarter of each fiscal year*. It is not to be presumed that a postmaster of this class could claim this further sum in the last quarter of his official year, unless it happened to be the last quarter of the fiscal year.

It is not to be presumed either that in the last quarter of the fiscal year this further allowance could not be made, because the postmaster at that time in service had not served four full quarters. This leads to the conclusion that the compensation is attached to the office, not to the individual.

This compensation is to exceed in no case \$250 for any one of the first three quarters of a fiscal year, or \$1,000 for a whole fiscal year. But the *office* may pay that much.

It is well settled that the time a person begins his services as an officer cannot affect his compensation. The Supreme Court of the United States said in *United States v. Dickson*, 15 Pet., 162, *supra*:

"When any person takes office in an *intermediate* time between one quarter and another, the practice is to pay him a proportion of the quarter's salary, accordingly; and if he leaves office before the end of his official year, to pay him for the like proportion of the last quarter."

In view of this, it would be clearly improper, to require a postmaster of the fourth class, whose services begin in an intermediate time between one quarter and another, to begin where his predecessor "left off," so that he would, for the work he performs, not receive the same advan-

tageous rate of commission, that he would have received had they begun at the first of a quarter.

Each postmaster of this class is entitled to one hundred per centum "*on the first fifty dollars or less per quarter.*" This, evidently, means the first fifty dollars of *his* quarter, beginning any day whatever—the first fifty with which he is concerned—and for which he accounts.

If, during one quarter, there should be ten postmasters, each claiming stamps canceled amounting to fifty dollars, each would be allowed one hundred per cent. thereon, but the quarterly compensation of all would not be allowed to exceed \$250 if it were one of the first three quarters of a fiscal year. Each one would, therefore, receive fifty dollars, less the excess of the compensation for the number of days he served at the rate of \$250 per quarter.

This is the method of adjustment pursued by the Auditor of the Treasury for the Post-Office Department, and applied in the present case.

The method insisted upon by Mr. Collins would, in the case stated, give the first nine compensation varying in amount, because calculated at different rates of percentage, and the tenth officer, none whatever for the number of days he might be employed during the quarter.

The former method not only is just as regards the postmasters, but is the only equitable method that could be devised, that would also prevent the limits fixed by the act from being transcended.

The settlement made by the Auditor of the Treasury for the Post-Office Department is affirmed, and the appeal is dismissed.

TREASURY DEPARTMENT,

First Comptroller's Office, May 1, 1884.

IN THE MATTER OF THE AUTHORITY OF THE ACCOUNTING OFFICERS
TO RECOGNIZE AN ASSIGNMENT OF A JUDGMENT AGAINST THE UNITED
STATES IN THE COURT OF CLAIMS.—JUDGMENT-ASSIGNMENT CASE.

1. A judgment against the United States in the Court of Claims is not *negotiable*, and, at common law and in courts of law, an assignment thereof is void; but such assignment is valid in equity, and will be sustained by courts of equity.
2. Accounting officers in the Treasury Department, as a general rule, recognize only legal rights, and deal only with parties having the legal title to claims, including judgments against the United States in the Court of Claims.
3. The *legal* owner of a claim against the United States may, in certain cases, be *stopped* from asserting it against the Government.
4. Accounting officers cannot lawfully recognize an assignment of a judgment against the United States in the Court of Claims.
5. *Claims-Assignment Case* (3 Lawrence, Compt. Dec., 28) reaffirmed and explained.
6. Section 3477 of the Revised Statutes renders void all powers of attorney to collect judgments against the United States in the Court of Claims, unless executed after the allowance of such judgments by the First Comptroller, and the issuing of the warrants for the payments thereof.
7. A judgment-creditor in a judgment against the District of Columbia may lawfully execute a power of attorney to any competent person, with authority to collect the judgment.

8. The opinion of the Attorney-General in Brooke's Case (12 Op. Att.-Gen., 221) not concurred in.
9. There cannot be in favor of an attorney any *lien* upon a judgment against the United States in the Court of Claims, which can be recognized by the Treasury Department.
10. A power of attorney cannot create any right as "coupled with an interest," which right can be recognized by the Treasury Department.

The question is presented to the First Comptroller to decide whether, when a judgment against the United States, in the Court of Claims, has been, by the judgment-creditor, assigned, wholly to one person, or in parts to several, a balance may be certified by the Comptroller in favor of, and payment may be made by Treasury warrant to, the assignee or assignees. The judgment to which this question relates, is that rendered in the case of *Grant v. United States* (18 Ct. Cl., 732), under the act of January 5, 1883 (22 Stat., 750).

DECISION BY WILLIAM LAWRENCE, *First Comptroller*.

A judgment against the United States in the Court of Claims is not *negotiable*, either at common law, or by statute. The *legal title* to such judgment does not pass by an assignment thereof to a purchaser. Such assignment, at common law and in courts of law, is void, but it is valid in equity, and courts of equity will give it effect (*Campbell's case*, 2 Lawrence, Compt. Dec., 2d ed., 241). The right of the assignee is in equity, and not at law. It has been decided, that, as a general rule, accounting officers can only recognize, and deal with, parties having the *legal title* to claims against the United States (*Indorsement case*, 4 Lawrence, Compt. Dec., 457; *Cowdrey v. Vandenburg*, 101 U. S., 572; *Di Cesnola's case*, 2 Lawrence, Compt. Dec., 2d ed., 158). The reasons are, that executive officers generally have no equity powers, nor means of requiring the appearance of parties having equitable interests, or of securing the requisite evidence to pass upon such interests, and can render no decision operating as a *res adjudicata* against persons not presenting a claim at law for adjudication; and that the Government cannot, without its express consent, be made a *trustee* (*United States v. Morris*, 10 Wheat., 303, 304), as it would be, if accounting officers recognized equitable rights. The means, by which equitable rights are to be protected, have been elsewhere stated (3 Lawrence, Compt. Dec., Introduction, xxxix; *Keyser's case*, 4 Lawrence, Compt. Dec., 308; *Indorsement case*, *Id.*, 457; *Watkins v. United States*, 9 Wall., 765; *Bonner v. United States*, *Id.*, 159; *United States v. Gillis*, 95 U. S., 412; 1 Lawrence, Compt. Dec., 2d ed., App., ch. XII, 538).

A *cestui que trust* cannot release a debt held by a trustee having the legal title. "Thus where a mortgage is made to A in trust for B, the *cestui que trust*, B cannot file a bill for foreclosure without joining A, for the reason that A is the only person who, on payment can discharge the mortgage; and where a contract was made to convey land to A in

trust for B, A must join in a bill for a specific performance, as the legal estate must be conveyed to him" (2 Perry, Trusts, § 873, citing *Woods v. Williams*, 4 Mad., 186; *Scott v. Nicoll*, 3 Russ., 476; *Hichens v. Kelly*, 2 Sm. & Gif., 264; *Cope v. Parry*, 2 J. & W., 588; *Hobson v. Stanier*, 9 Mod., 83).

In *Carey et al. v. Brown* (92 U. S., 172), the rule approved is that stated by the master of the rolls in *Horsly v. Fawcett* (11 Beav., 569), that when the object of a bill in equity is "to recover the fund with a view to its administration by the court, the parties interested must be represented. But it merely seeks to recover the trust-moneys, so as to enable the trustee hereafter to distribute them agreeably to the trusts declared. It is, therefore, unnecessary to bring before the court the parties beneficially interested." Such is now the settled rule of equity pleading and practice" (*Adams v. Bradley et al.*, 6 Mitch., 346; *Ashton v. The Atlantic Bank*, 3 Allen, 217; *Boyden v. Partridge et al.*, 2 Gray, 191; *Swift and Others v. Stebbins*, 4 Stew. & P., 447; *The Association &c., v. Beekman, Adm'r, et al.*, 21 Barb., 555; *Alexander v. Cana*, 1 De G. & Sm., Ch., 415; *Potts v. The Thames Haven and Dock Co.*, 7 Eng. Law & Eq., 262; *Story v. Livingston's Ex'r*, 13 Pet., 359). And see *O'Hara v. Mac Connell*, (93 U. S., 150). These authorities establish the doctrine that when the Government is dealing with its creditors for the purpose of paying its liabilities, it is, as a general rule, only required to ascertain and make payment to the claimant holding the legal title to the claim. The reason for the rule approved by the Supreme Court as stated, is that the trustee holding the legal title to a claim has the right to receive payment of a trust fund, and not the *cestui que trust*. When a judgment has been assigned, the judgment creditor holds the legal title to the judgment, and is a trustee in equity for the assignee thereof. No law prescribes what shall be evidence in equity of an assignment. No law gives to an assignment the effect of passing the legal title to a judgment, and no form of assignment precludes the assignor from controverting its validity. A court of equity has jurisdiction to pass on and settle by decree all controverted questions of assignment, and so to finally and conclusively decide on the rights of the parties. A court of law has no such authority. The accounting officers of the Treasury Department have no such power. They cannot require the presence of all parties in interest, or make any decision that will finally settle their rights. If the Treasury Department should pay the assignee of a judgment, the judgment creditor might deny the fact of assignment, or its validity, at least within twenty years, and demand payment, when the Government might be unable to prove an assignment or establish its validity, if attacked for want of consideration or for fraud. Thus the Government cannot safely pay the assignee of a judgment. It can only deal with the judgment creditor, who alone can release liability. The assignee must pursue in equity such rights as he may have to the fund when paid to the judgment creditor.

Army officers are, by regulation* having the force of law, authorized to transfer or assign their pay accounts "when due"; and, as a consequence, accounting officers recognize, and deal with, the assignees thereof, whether they are to be considered legal or equitable owners (Attorney-General Devens's opinion, May 17, 1877—15 Op. Att.-Gen., 271; Claims-Assignment case, 3 Lawrence, Compt. Dec., 27). The authorized assignments would seem, possibly, to give to such pay-accounts a negotiable character, but, if not, the duty to recognize the rights of the assignees, has the express sanction of law. So, it has been held, that, when the *legal* owner of a claim against the United States *assents* to its payment to an *equitable owner*, the former is *estopped* from afterwards asserting his claim against the Government (Bailey v. United States, 100 U. S., 439; Stowe v. United States, 19 Wall., 16; s. c., 9 Ct. Cl., 98; s. c., 5 *Id.*, 362; The Neuchatel Co.'s case, 16 *Id.*, 593). The cases cited do *not* decide that the *equitable* owner of a claim can maintain an action thereon a court of law, but *only* that the *legal owner* may by his act be *estopped* from maintaining such action. This rests solely on the ground of *estoppel*, and does not prove the legality of an assignment at law, or show that accounting officers perform a *legal duty* in paying the equitable owner of a claim, but the contrary, because, if the assignment, or the right of an assignee could be properly recognized at law by accounting officers, payment to the assignee would be legal, and it would not be necessary to resort to the effect of an *estoppel* in order to protect the Government or to defeat the legal owner from asserting a right.

Payment to the equitable owner with the assent of the legal owner is sustained, not because such payment is authorized at law, but because the latter is by his act precluded from calling in question the validity of the payment. An *estoppel* precludes the party *estopped* from asserting the truth—it gives to falsehood, when acted on, the force of truth. It precludes the party *estopped* from asserting the illegality of that which was illegal—it gives to unlawful acts, when done, the force of legal ones, as against the party who has authorized or assented to such unlawful acts. It makes no act legal, even when done, but only says that the party *estopped* shall not assert its illegality. But a public officer has no right, either in law or in equity, to do those unlawful acts, without the doing of which no *estoppel* could arise. His duty is to observe and obey the law. Hence, when the owner of a non-negotiable claim assigns it to a purchaser, and so does an act forbidden and void at law, a public officer charged with the duty of making a *lawful* payment of such claim has no legal authority to give effect to such assignment, or to put the Government in the attitude of asserting the force of an *estoppel*

* The regulation on this subject is as follows:

"No officer shall pass away or transfer his pay accounts not actually due at the time. When due, a pay account, signed by the officer, may be transferred by an indorsement stating to whom it is transferred, and may be paid by the proper paymaster, if satisfied of the genuineness of the officer's signature, and that he is under no stoppage or other disability as to pay" (United States Army Regulations, 1881, Art. LXXXII, par. 2380).

against the assignor. In the Claims-assignment case (3 Lawrence, Compt. Dec., 28), it is correctly said, that section 3477 of the Revised Statutes, which makes *void* assignments of claims, and powers of attorneys for receiving payments thereof, executed before the issuing of Treasury warrants for such payments, does not apply to judgments against the District of Columbia; and that the Attorney-General (12 Op. Att.-Gen., 221) has held that said section does not apply to judgments against the United States in the Court of Claims. The Attorney-General said:

"I am advised that the uniform practice and usage in the Treasury Department has been to *recognize assignments*,* and powers of attor-

* Assignments have been recognized in some cases.

January 20, 1870, A. Grant & Co. executed a paper, as follows:

"Power of attorney: Know all men by these presents, That the firm of A. Grant & Co. of Washington, in the District of Columbia, have made, constituted, and appointed, and by these presents do make, constitute, and appoint W. S. Huntington of said city their true and lawful attorney, for them and in their name, place, and stead to demand and receive from the Secretary of the U. S. Treasury the sum of \$1,324.64 out of a certain judgment rendered on the 6th day of December, 1869, for the sum of \$34,225.14 by the Court of Claims, against the United States and in favor of said firm of A. Grant & Co. and to sign and execute all necessary receipts and quittances therefor, giving and granting to my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as I might or could do if personally present at the doing thereof, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney or his substitute may or shall lawfully do or cause to be done by virtue hereof.

In testimony," &c.

This was witnessed, and certified as acknowledged before a notary public.

April 18, 1870, a similar paper was executed, purporting to assign to Middleton & Co. \$5,091.23 of said judgment.

On the same day, by report No. 173954, the First Auditor reported to the First Comptroller an adjusted account in favor of said assignees for the amounts so assigned, respectively, with a residue of \$28,226.51 in favor of A. Grant & Co.; and the First Comptroller certified the account as stated by the Auditor.

April 19, 1870, one warrant issued to "pay the parties as mentioned in the margin of this warrant or order." The parties so mentioned were as stated by the Auditor. Separate drafts were issued by the Treasurer on this warrant, in favor of the parties and for the amounts as stated.

The practice adopted in this case cannot, on legal principles, be sustained, and will not be followed (Bailey v. United States, 109 U. S., 438).

The word, "claim," has been defined in Claims-Assignment case (3 Lawrence, Compt. Dec., 19). The definition given in Dowell v. Cardwell (4 Sawyer, 222, 223), is not recognized as correct. See Bailey v. United States (109 U. S., 438).

This subject has been discussed in a valuable work, from which the following extract is taken:

"Accounts and Claims, in their general acceptance and meaning, are convertible terms; that is to say, in that loose sense all Accounts are Claims, and all claims are Accounts—whether simple or indisputable under plain provisions of law, or subject to dispute in equity, requiring special or extraordinary official adjudication and allowance by the President, heads of Departments, or accounting officers, and in many instances by subsequent provisions of law, on the establishment of their equity, to authorize their payment.

But, accounts of the latter description may be contradistinguished from the former—which, involving no question of doubt, or want of appropriation applicable to them, are therefore audited and passed, as a matter of course—whereas, those subject to dispute are susceptible of being classed among 'things which one has not in his possession, and are wrongfully withheld by another.' Yet, also, matters of simple account, wherein the equity is not disputed, may nevertheless, by remissness in their timely

ney to collect and receive such judgments from the Treasury as valid, when made after the recovery of the judgment and before the issuing of a warrant for its payment" (12 Op. Att.-Gen., 221).

Recognizing as undoubtedly correct the construction of section 3477 of the Revised Statutes—that it does not apply to judgments against the District of Columbia—the effect is, not to give to assignees of such judgments a legal title thereto, or to accounting officers authority to recognize, or deal with, assignees or equitable owners thereof. There has been no general practice in the Treasury Department of recognizing *assignments* of judgments. Such practice would be unauthorized and unlawful for the reasons already stated (Campbell's case, 2 Lawrence, Compt. Dec., 2d ed., 240; Indorsement case, 4 Lawrence, Compt. Dec., 457).

Inasmuch as section 3477 of the Revised Statutes does not apply to a judgment against the District of Columbia, a subsisting and unrevoked power of attorney authorizing an attorney to receive payment thereof may be lawfully recognized. Such power of attorney will be valid as an authority to collect money thereon.

As a general rule, it is the right of every person, *sui juris*, when not restrained by statute, to do by an agent, duly constituted, whatever such person is capable of doing himself (Story, Agency, § 6; Wharton, Agency, §§ 8, 9). This principle is incorporated into well-understood maxims—*qui per alium facit per seipsum facere videtur*—*qui facit per ali-*

presentation, or the inapplicability of any appropriation, become *claims* to be prosecuted, in a friendly sense, to obtain the authority of a relief act. And these distinctions justify the separate denominations of simple claims, and involved claims. There are also claims which may be called absolute; and there are others that may be designated as discretionary. Claims, then, in contradistinction from accounts, may be thus classed and defined:

I. *Simple Claims*, wherein the equity is clear, involving no dispute; but from a remissness in their presentation during the regular course of disbursements being made for similar accounts or from the inapplicability of any existing appropriation, require to be prosecuted, only in a friendly sense, to obtain the authority of relief acts, for their payment.

II. *Involved Claims*, wherein the equity is not clear, but require to be prosecuted and discussed, in order to remove all doubts of their equity, and consequently obtain the authority also of relief acts for their payment—being of the nature of things not in possession, of which the ownership is challenged, and wrongfully withheld by another, until the adjudication of a proper tribunal awards it to the claimant.

III. *Absolute Claims*, also, there are, which are of another and higher order, being based on evidences of Treasury securities and other public obligations, such as certificates of stock, treasury notes, bounty land scrip, bounty land warrants, bounty land certificates, Choctaw scrip, certificates of forfeited land stock, pension certificates, and other evidences of public debt.

IV. *Discretionary Claims*, also, there are, being an anomalous class of claims, that do not assort with either of the foregoing, but rest entirely with the authority and discretion of the heads of Departments, and the President, respectively, as ordered and authorized by law, and the Constitution, if not in some degree extended by assumption, or forced construction of either.

1. Claims of the First Class above mentioned, may arise out of the regular subjects of disbursement by disbursing agents of the Government under indefinite or specific appropriations, in the three following ways: 1st, from *omissions* to render such accounts to, or by, disbursing agents in due time—2d, from insufficient *vouchers* of such accounts, rendered to, or by, disbursing agents in due time—3d, from *unsatisfactory adjustment*, by accounting officers of such accounts rendered with vouchers to, and by, disbursing agents of the Government; either of which defects may be subsequently corrected, and the claims adjusted by the proper accounting officers, under direction of the Head of Department, or the President: Whereupon, if they prove to be based on a

um facit per se (Broom, Legal Max., 7 Am. ed., 817; 3 Op. Att.-Gen., 30; 3 Lawrence, Compt. Dec., Introduction, xLi). Hence, the judgment-creditor in a judgment rendered against the District of Columbia may lawfully give a power of attorney as stated. The agent in such case receives payment of the judgment, not in his own right, but as acting for his principal, the judgment-creditor. The act of the agent in receiving payment is the act of the principal. The question, what the agent shall do with the money after he has received payment, is one with which the United States has no concern. It is not doubted, that, if the judgment-creditor has, in such case, for a sufficient consideration, assigned the judgment to the agent, he will be protected by the proper court of equity in retaining the money collected thereon as his own. That, however, is a question to be settled by the parties in interest, and the courts (*Trist v. Child*, 21 Wall., 441). The incorporation in such power of attorney of an assignment of the judgment to the purchaser thereof, or an assignment by a separate instrument, while transferring no legal title which can be recognized in the Treasury Department, may be useful in some respects. It may add to the authority to receive payment. After it is made, the force of an *estoppel* against any claim by the judgment-creditor (*Bailey v. United States*, 109 U. S., 438). And, in the event of the death of the judgment-creditor before payment, it, perhaps, might give to the power of attorney the force of one founded on a consideration, and so not revocable by death. But these are questions not

fair transaction, they are paid as a matter of course out of some appropriation applicable thereto, or, in default thereof, they may be authorized and provided for by specific acts of Congress.

2. Claims of the Second Class, although the Government cannot be sued, because, by virtue of its sovereignty, it is courteously supposed to be incapable of wrongfully withholding justice, do, nevertheless, bear a strong analogy to that legal definition by Bouvier, which says—"a claim is a challenge of the ownership of a thing which a man has not in possession, and is wrongfully withheld by another."—*Bouvier's Law Dictionary*—'Claims.'

3.—Claims of the Third Class, on the other hand, based on evidences of Treasury securities and other public obligations or assumptions to pay, being *absolute*, are exempt from any involvement of doubt, and are therefore *not* withheld—requiring no prosecution, but only the bare ascertainment of their identity or genuineness in auditing, passing, and reporting them for payment.

4. Claims of the Fourth Class fill the great flood gates or outpourings of the *Revenue* whether *realized* or *anticipated*. They are of several varieties; which, in some shape or other, involve in their vortex every disbursement from the Treasury, either remotely or directly, by controlling the *initiatives* thereto, in most cases, and the realization of many of them when initiated by executive discretion.

The several varieties or descriptions of *Discretionary Claims* and the manner in which a large portion of them are advocated or opposed, and confirmed or disallowed, constitute the great bane of our practical Government. A minute statement of all these varieties, in the *initiatives* of which nearly all other claims may be said to resolve themselves—more practically, at periods of four years, though at all times their continuance, with few exceptions, is discretionary—will be given on a future occasion. In the mean time, there is only room here to remark, that a court, to consist of permanent salaried Commissioners of Claims, would go a great way to remedy many of the defects of our system in regard to the adjudication of all descriptions of claims, and to establish uniform rules of equity to govern the proceedings in their prosecution. Such a proposition, with a bill to that effect, has been reported from time to time by committees of Congress, but as yet, without adoption. The report (House Document No. 498, 30th Congress, 1st session) by the Hon. J. A. Rockwell, as chairman of the committee of claims, in favor of this measure, is replete with important facts and elucidations of the subject, setting forth the monstrous evil of the present system." (The Treasury Department, &c., by Robert Mayo, Washington, 1847, Vol. 2, Index, page viii.)

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now requiring a decision (McAllister's case, 2 Lawrence, Compt. Dec., 2d ed., 178; Bond-continuance case *Id.*, 218). The assignment might also, perhaps, be evidence of such equitable right of the party, in whose favor it is made, as would enable him to secure for such interest the form of protection, to which reference has been made* (3 Lawrence, Compt. Dec., Introduction, XLII; 3 Op. Att.-Gen., 30).

* Such power of attorney and assignment may be in the form following:

"Know all men by these presents, That I, Albert Grant, of Washington City, in the District of Columbia, in consideration of ten thousand dollars to me paid by John Smith of said city, do hereby make, constitute, and appoint said John Smith my true and lawful attorney irrevocable, for me and in my place and stead, to collect and receive payment of a judgment rendered by the Court of Claims, in my favor on the first day of January, 1884, against the District of Columbia, for ten thousand dollars, and to execute and deliver all proper releases and acquittances thereof, and to receive, indorse, and receive payment of, any and all warrants granted, or which may be granted for the purpose of making payment of said judgment, and to receive, indorse, collect, and receive payment of, any and all checks and drafts issued, or which may be issued to make payment of said warrants, or judgment.

And, in consideration of said sum so paid, I, said Albert Grant, do hereby sell, assign, and transfer said judgment, and all warrants, and drafts above mentioned, to said John Smith, and do hereby covenant and agree with said Smith, that I have good right, full power, and lawful authority so to sell, assign, and transfer said judgment, warrants, and drafts, that the same are free from all liens, claims, and demands thereon, and that I do and will warrant and defend the full and absolute right and title to said judgment, warrants and drafts in said Smith, and against all claims and demands. And I give unto said Smith as my attorney, and as my assignee, full power to do everything whatsoever, necessary under the statute or executive regulations, as fully as I could do if personally present, hereby ratifying and confirming all that may be done by my said attorney by virtue hereof. And the power herein given is irrevocable.

In witness whereof, I have hereunto set my hand, the — day of —, —. [SEAL.]"

This power of attorney and assignment should be filed with a certified copy of the judgment, both constituting the voucher for the proper disbursing officers charged with the duty of making payment.

For form of execution and authentication, see Di Cesnola's case (2 Lawrence, Compt. Dec., 2d ed., 165).

Powers of attorney to collect judgments against the United States, duly executed after the issuing of Treasury warrants for the payments thereof, should be filed in the First Comptroller's Office. The practice as to these is, to note in the Treasury warrants issued to make payments of such judgments, the names and addresses of the attorneys, to whom the Treasurer's drafts are to be delivered. The attorneys, on receipts of the drafts, present them to the Deputy First Comptroller, who makes indorsements thereon as follow:

"FIRST COMPTROLLER'S OFFICE.

Payment to
John Smith, attorney,
is authorized by virtue of
power filed in this office.
J. TARBELL,
Deputy Comptroller."

This is evidence of the authority of the attorneys to indorse and collect the drafts, on which evidence payments are made by the Treasurer.

Section 3737 of the Revised Statutes provides, that:

"No contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall

But the same rule applicable to judgments against the District of Columbia cannot properly be applied to judgments against the United States. It is now authoritatively decided, that section 3477 of the Revised Statutes *does* apply to judgments against the United States.

The late case of *Bailey v. United States* (109 U. S., 439), affords the best instance of the length to which the Supreme Court of the United States has gone in expounding this view. In that case, a decree had been passed by a United States court, on March 25, 1868, for a sum of money in compensation for an illegal capture by the United States, for the satisfaction of which decree an appropriation by Congress was necessary. The claimants, on February 6, 1869, gave a power of attor-

cause the annulment of the contract or order transferred, so far as the United States are concerned. All rights of action, however, for any breach of such contract by the contracting parties, are reserved to the United States."

In a note to Winthrop's "Digest of Opinions of the Judge-Advocate-General," (Washington, 1880, p. 190) it is said:

"That an assignment of a contract transfers no legal claim or right of action to the assignee, and that a contract when assigned is no longer binding upon the United States, see *Wheeler v. United States*, 5 Ct. Cl., 504; *Wanless v. United States*, 6 *Id.*, 123; *Gill v. United States*, 7 *Id.*, 523; *McCord v. United States*, 9 *Id.*, 156; *Francis v. United States*, 11 *Id.*, 638; X Opins. of Attys.-Gen., 523. But it has been held by the Attorney-General that the statute on the subject, (Sec. 3737, Rev. Sta.,) is intended simply for the benefit and protection of the United States, which, therefore, is not compelled to avail itself of a transfer by the contractor to annul the contract, but may recognize the same and accept and pay the assignee [*Bailey v. United States* 109 U. S., 439]. 'Were it to be held,' observes the Attorney-General, 'that a transfer of an interest would absolutely avoid the contract, it would enable any party making a contract with the United States to avoid it by simply transferring an interest therein, which is a construction manifestly inadmissible.' Opinion in the case of the 'fifteen per cent. contracts,' of April 27, 1877, (XV Opins., 236.) And similarly held by the same authority in a later opinion of March 7, 1879, (XVI Opins., 278)—that while the United States may avail itself of an assignment to declare the contract annulled, it is not required to do so, but, if deemed to be for its interest, may recognize the assignee. But it is clear that an officer of the army could not properly assume to treat an assignment of a contract (or interest therein) as valid, without the authority and direction of the Secretary of War. That for a mail contractor to contract with another person to transport the mail for him, and as his servant or employee, was not an assignment of his contract with the United States, was held in the recent case of *Frye v. Burdick*, 67 Maine, 408."

In the same work (p. 191) it is also said:

"Where, by a written agreement between a contractor and another party, the latter was empowered to receive the payments from the United States, in consideration of which he undertook to continue and complete the work contracted for, held that such agreement was a power coupled with an interest, and operated as a transfer within the meaning of section 3737, Revised Statutes."

In support of which there are cited the "Opinions of the Attorney-General of April 27, 1877, (XV Op., 236), and March 7, 1879, (XVI Op., 278), also *Francis v. United States*, 11 Ct. Cl., 638."

But this does not seem to take into view section 3477 of the Revised Statutes, or its effect in making assignments void. It is clear that a claim against the United States cannot be assigned, and that a power of attorney cannot be executed so as to be coupled with an interest, which will entitle the assignee of a claim to demand through executive officers payment of the United States (*Di Cesnola's case*, 2 Lawrence, Compt. Dec., 2d ed., 152; *Keyser's case*, 4 Lawrence, Compt. Dec., 263, 332, 353). And it is well settled, that a power coupled with an interest is irrevocable, when such power can be lawfully created (*Hunt v. Rousmaniere's Admr's*, 2 Mason, 244; *Wheeler v. Knaggs*, 8 Hammond, Ohio, 169; *McDonald v. Admr. of Black*, 20 Ohio, 185; 7 Op. Att.-Gen., 35).

ney to one Godeffroy to collect the amount which should be appropriated in satisfaction of the decree. One year and five months later, on July 7, 1870, the appropriation was made; and thereafter the money was paid by the Treasury officials to Godeffroy on the power of attorney of February 6, 1869. Godeffroy failed to account to the claimants for the money, and they brought suit against the United States, asserting the invalidity of the power of attorney to Godeffroy, by virtue of the statute under consideration, and demanding payment to themselves of the amount appropriated.

Harlan, Judge, in delivering the opinion of the court, says, that:—

“A mere power of attorney given before the warrant is issued—so long at least as it is unexecuted—may undoubtedly be treated by the claimant as absolutely *null and void* in any contest between him and his attorney in fact. And it may be so regarded by the officers of the Government whose duty it is to adjust the claim and issue a warrant for its amount. But if those officers chose to make payment to the person whom the claimant, by formal power of attorney, has accredited to them as authorized to receive payment, the claimant cannot be permitted to make his own disregard of the statute the basis for impeaching the settlement had with his agent. To hold otherwise would be inconsistent with the ruling heretofore made—and with which, upon consideration, we are entirely satisfied—that the purpose of Congress, by the enactments in question, was to protect the Government against frauds upon the part of claimants and those who might become interested with them in the prosecution of claims, whether before Congress or the several Departments. The title of the act of 1853 suggests this purpose. It is to prevent frands upon the Treasury. An effectual means to that end was to authorize the officers of the Government to *disregard any assignment* or transfer of a claim, or *any power of attorney* to collect it, unless made or executed after the allowance of the claim, the ascertainment of the amount due thereon, and the issuing of the warrant for the payment thereof. Other sections of the statute—those forbidding officers of the Government and members of Congress from prosecuting or becoming interested in claims against the Government, and those punishing the bribery or undue influencing of such officers or members—sustain the view, that what was in the mind of Congress was to protect the Government in the matter of claims against it.”

The Comptroller, therefore, in certifying a balance on a judgment against the United States in the Court of Claims, must certify such balance in favor of the judgment-creditor, and cannot recognize any assignment thereof; and the Treasury warrant for payment must also be in favor of the judgment-creditor. That construction of section 3477 of the Revised Statutes, which renders it inapplicable to powers of attorney to collect such judgments, will not be acquiesced in. The opinion of the Attorney-General in Brooke's case (12 Op. Att.-Gen., 221) is no longer to be recognized as correct on this subject. It is in conflict with the decision in the case of Bailey v. United States (109 U. S., 439). A judgment against the United States is a “*claim*” within the meaning of section 3477 of the Revised Statutes. The Supreme Court, in the case last cited, says that the purpose of the statutes, from which this section was taken, was, “to prevent frauds upon the Treasury. An effectual

means to that end was to *authorize the officers of the Government to disregard any assignment or transfer of a claim, or any power of attorney to collect it, unless made or executed after the allowance of the claim, the ascertainment of the amount due thereon, and the issuing of the warrant for the payment thereof.*" *Bailey v. United States* (109 U. S., 439)*.

The judgment-creditor may, even before the issuing of a warrant to pay the judgment, lawfully execute a power of attorney, authorizing any person therein named to *receive*, but *not to indorse, or collect*, the Treasurer's draft, which may be issued in payment of any warrant granted after the execution of such power of attorney.

But before a Treasury draft issued to make payment of the judgment can be delivered under such power of attorney, a release of the right to receive the draft will be required from the *attorney of record* of such judgment-creditor, because the Regulations of the Treasury Department on this subject give such attorney "the right to receive any draft therein" (*Dunnegan's case*, 2 Lawrence, Compt. Dec., 2d ed., 96). The attorney of record cannot, *for his services* as such, or for advances of money prior to judgment, have any lien upon such draft (*Di Cesnola's case*, 2 Lawrence, Compt. Dec., 2d ed., 152). But the retainer of an attorney is made in view of the Regulations mentioned, which in effect become a part of the contract of retainer, and so give him a right to the possession of the draft. This right is one attached by the Regulations

*The present case may well illustrate the necessity for section 3477 of the Revised Statutes, and the danger of recognizing any assignment even of a judgment. Since the judgment in this case was rendered, Henry S. Davis filed in the First Comptroller's office two papers, which he alleges, were executed by Albert Grant, February 10, 1875, professing, in consideration of \$2,000, to assign to said Davis, and to empower him to collect, "the balance of the claim of said grant against the United States, arising out of a contract of A. Grant & Co., with said Government for the erection of a fire-proof store-house at Schuylkill * * * ; the amount of said claim being about \$14,000, and is a balance due said grant, caused by an error in the rendering of a judgment in the * * * Court of Claims (5th Ct. Cl., 80)," which "claim is now pending on petition before Congress." The act of January 5, 1883 (22 Stat., 750), under which the judgment herein was rendered, was not passed at the date of these papers. Said Davis now claims that he is the owner of the judgment, while Grant alleges, that no sale or assignment of the claim was ever made by him; that he holds a paper executed to him by Davis, of the same date, of February 10, 1875, and showing that no assignment of any claim was made, except as security for a loan of \$2,000, which, he further alleges, has been paid, and that for other reasons he is not even indebted to Davis for money advanced by way of loan or otherwise. It is understood, also, that other parties are claiming an interest in the judgment under assignments made since it was rendered.

There can be no safety for the Government in paying its creditors, except by disregarding all assignments of claims, of whatever character, unless made and executed in the mode, and at the time, authorized by section 3477 of the Revised Statutes.

It may be possible that a case may arise in which it should be held that the legal title to a claim has passed to an assignee by estoppel. (*McNeil v. The Tenth National Bank*, 46 New York, 325; *Cowdrey v. Vandenburg*, 101 U. S., 575; *McKnight v. The United States*, 98 U. S., 185; *Kelley v. The Board of Public Works*, 75 Va., 263; *Ballard Pavement Co. v. Mandel*, 2 MacArthur, 351; *Neuchatel Co.'s case*, 16 Ct. Cl., 593; *Wharton, Ev.*, 1170; *1 Dillon, Municipal Corp.*, 262; *Angel & Ames, Corp.*, 309).

to the relation of attorney and client; it is one of *personal* trust and confidence (Wharton, Agency, §§ 28, 276, 579, 709; In the matter of Bleakley, 5 Paige, Ch. 311; Hitchcock v. McGehee, 7 Port., 556; Johnson v. Cunningham, 1 Ala., 249; Kellogg & Co. v. Norris, 10 Ark., 18; Ratcliff v. Baird, 14 Tex., 43; Pollard v. Rowland, 2 Blackf., 22; Bond-Continuance case, 2 Lawrence, Compt. Dec., 2d ed., 224). Hence, upon the death of such attorney, the right to receive the draft does not pass to his legal representatives. The client has reposed no personal confidence in them, and has not agreed to trust to their discretion or judgment as to the custody of the draft.

No assignment of the judgment will be recognized.

TREASURY DEPARTMENT,

First Comptroller's Office, February 18, 1884.

IN THE MATTER OF THE VALIDITY OF AN ASSIGNMENT OF A CLAIM AGAINST THE UNITED STATES, AND OF A POWER OF ATTORNEY TO RECEIVE POSSESSION OF A DRAFT ISSUED IN PAYMENT OF SUCH CLAIM, AND ALSO PAYMENT THEREOF, WHICH ASSIGNMENT AND POWER WERE EXECUTED BEFORE SAID CLAIM HAD A LEGAL EXISTENCE, AND WHILE IT WAS DEPENDENT ON AN ACT OF CONGRESS THEREAFTER TO BE PASSED.—GRANT AND DAVIS CASE.

1. Section 3477 of the Revised Statutes generally extends to all claims against the United States, liquidated, or unliquidated.
2. A claimant, who, in violation of said section, executes a power of attorney authorizing an agent to receive payment of such claim, is estopped from asserting the invalidity of such power of attorney, after payment has been made under it by officers of the Government acting in good faith without objection, or revocation of the power, by the claimant.
3. Where no estoppel arises from warranty, recital, or otherwise, a release or conveyance operates only on existing rights.
4. Contracts will, by *construction*, generally be held as only *intended* to apply to existing rights: when in terms they are made and intended to be applicable to expectancies, which are merely naked possibilities, they are inoperative, unless made operative by warranty or recital, in good faith upon a sufficient consideration: when in terms they are made and intended to apply to rights which have no legal existence, and which can have none except by force of a law to be thereafter passed, they are void on grounds of public policy.

At the December term, 1869, of the Court of Claims A. Grant & Co. recovered judgment, as the *record* shows, against the United States for \$34,225.14 (Grant & Co.'s case, 5 Ct. Cl., 71). Albert Grant, the surviving member of the firm of A. Grant & Co., claimed that the evidence proved a right to recover \$48,241.43, and that, in fact, the court intended to render a judgment for this sum instead of \$34,225.14—the difference being \$14,016.29. The judgment, as rendered, became final and unchangeable by the adjournment of the court in 1870. Subsequently, Albert Grant memorialized Congress to authorize the court to re-open and re-adjudicate the case upon the evidence theretofore sub-

mitted. Pending this memorial, on the 10th of February, 1875, Grant, by an instrument in writing, as it states, in consideration of \$2,000, assigned to Henry S. Davis all of the balance of his claim arising out of the contract sued on in said case in said court, being "the balance due the said Albert Grant [and] caused by an error in the rendering of a judgment in the United States Court of Claims." On the same day Grant executed a power of attorney in terms "irrevocable," authorizing Davis to collect from the Treasury Department said balance so claimed to be due. The assignment and power of attorney were not filed in the office of the First Comptroller until March 8, 1884. On the same date of the execution of said assignment and power of attorney, February 10, 1875, Davis executed to Grant a paper agreeing, "when said claim is collected * * * , to pay in cash all of said claim unto the said Albert Grant, or his order, except the sum of two thousand dollars."*

On Grant's memorial the following act of Congress was passed, and approved January 5, 1883 (22 Stat., 750) :—

"That the Court of Claims be, and it is hereby, directed to re open and re-adjudicate the case of Albert Grant and Darius Jackson (doing business as A. Grant and Company) upon the evidence heretofore submitted to the said court in said cause (fifth Court of Claims Reports, page eighty), and if said court in such re-adjudication shall find from such evidence that the court gave judgment for a different sum than the evidence sustains or the court intended, it shall correct such error and adjudge to the said Albert Grant such additional sum in said cause as the evidence shall justify, not to exceed fourteen thousand and six-

* The assignment, power of attorney, and agreement are as follows :—

"Memorandum of an agreement made and entered into, this 10th day of February, A. D. 1875, by and between Albert Grant, of the city of Washington, in the District of Columbia, of the first part, and Henry S. Davis, of the same place, of the second part, witnesseth : That the said party of the first part hereto doth, for a valuable consideration, to wit, the sum of two thousand dollars to him in hand paid by the party of the second part hereto, the receipt of which is hereby acknowledged, hereby assign, transfer, and set over unto the said Henry S. Davis all of the balance of the claim of the said Albert Grant against the United States, arising out of a contract of A. Grant & Co. with said Government, for the erection of a fire-proof storehouse at Schuylkill Arsenal, Philadelphia, Pennsylvania ; the amount of said claim being about fourteen thousand dollars, and is the balance due the said Albert Grant caused by an error in the rendering of a judgment in the United States Court of Claims, recorded among the records of said court, Reports, vol. 5, page 80.

[The claim as aforesaid is now pending on petition before Congress, and has passed unanimously the Committee of Claims of the House of Representatives.]

For the faithful performance of this agreement on the part of the said Albert Grant, he doth by these presents hereby bind himself, his heirs, executors, and administrators in the penal sum of two thousand dollars, to be recovered by judgment of court, or otherwise, should there be any default whatsoever in any part of this agreement on his part.

In testimony whereof the said parties hereto have interchangeably affixed their signatures and seals the day and year first aforesaid.

"ALBERT GRANT. [SEAL.]

"Witnesses :

"R. W. DOWNMAN,

"O. C. GREEN."

"POWER OF ATTORNEY.

"Know all men by these presents that I, Albert Grant, of the city of Washington, in the District of Columbia, have made, constituted, and appointed, and by these presents do make, constitute, and appoint, Henry S. Davis, of the same place, my true

teen dollars and twenty-nine cents; and the amount by re-adjudication in favor of the said Albert Grant shall be a part of the original judgment in the cause recorded in the fifth Court of Claims Reports page eighty."

After the passage and approval of this act, the Court of Claims did re-open and re-adjudicate the case, and, on the original evidence submitted therein, corrected its error, and June 11, 1883, adjudged, *as part of the original judgment in the case*, the additional sum of \$14,016.29. (Grant v. United States, 18 Ct. Cl., 732.)

From this last action of the Court of Claims the United States appealed to the Supreme Court of the United States, which latter court, on motion, dismissed the appeal. (United States v. Grant, p. 110, U. S., 225.)

January 25, 1883, Henry S. Davis filed an *intervening* petition in the case of Grant v. The United States in the Court of Claims, setting up his claim under the assignment and power of attorney executed by Grant as above mentioned; in which petition Davis "respectfully submits that he ought to be admitted to control, or to participate in controlling, such proceedings as may be necessary and proper to the re-adjudication of the said cause, as by the said act of Congress provided; and to that end he prays that he may be permitted to designate an attorney of this court, with full power and authority in that behalf, and that such other action may be taken by the court in the premises as it may seem meet and proper to the petitioner's case."

March 22, 1883, a motion was made to strike this petition from the record. Upon this motion the court journal shows the following entry:—

"April 23, 1883.—The petition of Henry S. Davis for leave to intervene in this case was withdrawn by the court."

and lawful attorney irrevocable, for me and in my name, place, and stead, hereby revoking and annulling all former powers of attorney or authorizations whatever in the premises, to collect from the Treasury Department of the United States the full and complete sum of about fourteen thousand dollars, the same being the balance of an amount due me by the Government, arising out of my contract for the erection of a fire-proof storehouse at Schuylkill Arsenal, Philadelphia, Pennsylvania; and in consideration of the fact that the said Henry S. Davis hath advanced and paid me the sum of two thousand dollars on the amount due me as aforesaid, I do hereby constitute these letters of attorney irrevocable on my part; and to, from time to time, furnish any further evidence necessary, or that may be demanded, giving and granting to my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as I might or could do if personally present at the doing thereof, with full power of substitution and revocation, and to receipt and sign all vouchers; hereby ratifying and confirming all that my said attorney or his substitute may or shall lawfully do or cause to be done by virtue hereof.

In witness whereof I hereunto set my hand and seal this tenth day of February, eighteen hundred and seventy-five.

"ALBERT GRANT. [SEAL.]

"Witnesses:

"R. W. DOWNMAN,

"O. C. GREEN."

"Received from Albert Grant an assignment of a claim, of which the foregoing is a copy, with full power of attorney to collect the same from the Treasury of the United States, and when said claim is collected I promise to pay in cash all of said claim unto the said Albert Grant, or his order, except the sum of two thousand dollars.

"H. S. DAVIS."

February 27, 1884, Grant executed, and on *the next day* filed with the First Comptroller, an instrument, which recites that, in consideration of \$5,000 paid by Belden Noble, he, said Grant, appoints said Noble his attorney irrevocable—"hereby annulling and *revoking all former powers of attorney, whatever, in the premises*—to collect from the Treasury of the United States \$5,000, hereby assigned to him as a part of the judgment of \$14,016.29," rendered in favor of Grant in the Court of Claims June 11, 1883, in accordance with the act approved January 5, 1883 (22 Stat., 750)—giving to said attorney full power to do every necessary act, to receive and receipt for a warrant for said sum so assigned, and to indorse the name of Grant to any check or warrant that may be given in payment thereof.*

Grant alleges, and Davis denies, that the former has repaid the latter the \$2,000 advanced by him February 10, 1875. Davis asks that his power of attorney be recognized by the Treasury Department, and that the warrant to be issued in payment of the said sum of \$14,016.29 may be delivered, and the amount thereof may be paid, to him. Grant insists that the warrant shall issue in his favor, and that the draft in payment thereof shall be delivered to Noble.

May 20, 1884, the case was orally argued before, and printed briefs were submitted to, the First Comptroller.

Hon. John Pool and Henry E. Davis for Henry S. Davis:

"Davis is entitled to receive and collect the warrant to be issued in payment of the amount adjudicated by correction as part of the original judgment.

Two objections are suggested against this right: 1. That Grant has constituted another attorney in fact since the passage of the act of January 5, 1883; and, 2, That the assignment and power of attorney to Davis are void by reason of section 3477, Revised Statutes.

I. The power of attorney to Davis is irrevocable. The instrument so provides in terms, being a power given for a valuable consideration duly recited. The donor cannot revoke a power so given.

This is conclusive of the case, unless all effect is to be denied the power of attorney by reason of the section referred to; for the power of attorney being given due effect, the existence or non-existence of an assignment becomes quite immaterial.

II. The other objection is equally untenable. A consideration of it involves examination of: 1, The subject matter of the assignment and power of attorney; and, 2, The object, scope, and application of the law relied on.

1. *The subject matter was not a claim upon the United States within the meaning of that law.*

(a.) What is such claim upon the United States? Dearly, J., in *Dowell v. Cardwell* thus answers this question: Within the meaning and intent of section 3477, Revised Statutes, a 'claim upon the United States' is something in the nature of a *demand for damages arising out of some alleged act or omission of the Government, not provided for or acknowledged by law*. As the term imports, it is something asked for

* The residue of the judgment is withheld until the result of a suit is known, in which the United States is plaintiff against Grant and others.

or demanded on the one hand and not admitted or allowed on the other. When the demand is admitted, authorized or provided for by law, it is not a mere claim, but a debt. (4 Sawyer, 228-9).

A 'claim upon the United States' is, then, a demand, as of right, for compensation, in respect of which both the liability of the United States and the amount to be paid are yet to be established. And the successful prosecution of such a claim necessarily involves, (1) establishing the facts, and (2) fixing the liability of the Government thereunder.

(b.) Grant's application to Congress was in no sense a 'claim upon the United States.'

The payment on the judgment of the Court of Claims operated a full discharge to the United States, touching all of the matters involved in the controversy. (See. 12, Op. Att.-Gen., 217.) From this point, Grant's so-called 'claim' was merely, that, by an error, not of the United States, but of the Court of Claims, the Government had profited at his expense; in respect of enabling that court to correct which error, Grant made no demand but an appeal to Congress.

The granting that appeal was wholly matter of grace with the Government.

After the judgment of the Court of Claims in the premises, what had Grant in respect of which he might assert a 'claim upon the United States?' *Absolutely nothing. He was wholly at the mercy of Congress.*

If satisfied in the sum in which it was originally rendered, there was an end of value in the judgment, unless, as turned out to be the fact, it ought to have been rendered for a larger sum. *The possibility of such event was all that Grant had. This was not a right against the Government in respect of which a demand might be made.* Whatever it was, it was as 'part of the judgment,' as incident thereto, but in no sense any longer a 'claim' of any sort.

The court had technically lost jurisdiction over the subject-matter; its term had expired. Grant's memorial was, that Congress might re-invest the court with the necessary jurisdiction in the premises; not that the United States might be declared liable in any particular, nor that he might adduce testimony to establish any fact.

Congress enacted that the court should re-open and re-adjudicate the case upon the testimony already submitted, and that any correction of error in the premises should be a part of the original judgment in the cause. Assuredly, this was not its way of dealing with a claim."

The Supreme Court said:

The act of Congress, in its legal effect, is nothing more than a direction to the Court of Claims *to entertain an application to correct an error in the entry of one of its former judgments.* The readjudication ordered is to be upon the old evidence, and, if an error is found, the correction is to be made, not by rendering a new judgment, *but by amending the old one,* (United States v. Grant, 110 U. S., 226.)

At the time the assignment and power of attorney were executed the subject-matter of the instruments was then not a claim. It had passed from the category of claims into that of judgments; and a judgment is not a 'claim upon the United States' within the meaning of the section of the Revised Statutes relied on (12 Op. Att.-Gen., 216). Only the rectification of the judgment was sought on the evidence already submitted, and in respect of which no consideration could be urged, no instrumentality used, no influence exerted, save only by sheer operation of the thing itself.

2. *Even were the subject-matter of Grant's application a 'claim upon the*

United States,' the assignment and power of attorney in question are not within the contemplation of section 3477, Revised Statutes.

Section 3477 applies only to *unliquidated and unadjudicated* claims upon the United States, from which category Grant's application to Congress must be excluded. But even were we to concede that the language of that section is sufficiently comprehensive to include a so-called claim of the character of Grant's, after the rendition of the erroneous judgment, still the assignment of such, or a power of attorney to collect it, executed before its allowance, would not offend against the law.

In *United States v. Gillis* (95 U. S., 414), it was ruled, that an unadjudicated, unliquidated claim before the Court of Claims is within the provisions of the statute. In *Irwin v. United States* (97 U. S., 392), it was held that the passing of a claim to an assignee in bankruptcy is not within the prohibition. In *Spofford v. Kirk*, (*Id.* 484), it was held, that accepted orders transferring part of the expected proceeds of an unadjudicated claim were void under the statute; and that was the most objectionable case conceivable, as it did not convey away the whole of the claim, but only a part, thus, in reality, 'multiplying the persons with whom the Government has to deal.' In *Goodman v. Niblack* (102 U. S., 556), it was held, that in a general assignment for the benefit of creditors a claim against the Government would pass, notwithstanding the statute.

See *Bailey v. United States* (109 U. S., 432).

In *Spofford v. Kirk* (97 U. S., 489, 490), it is said :—

'The intention of Congress must be discovered in the act itself. It was entitled "An act to prevent frauds upon the Treasury of the United States." * * * What the frauds were against which it was intended to set up a guard, and how they might be perpetrated, nothing in the statute informs us. We can only infer from its provisions what the frauds and mischiefs had been, or were apprehended, which led to its enactment.

'One, probably, was the possible presentation of a single claim by more than a single claimant, the original and his assignee, thus raising the danger of paying the claim twice or rendering necessary the investigation of the validity of an alleged assignment. Another, and greater danger, was the possible combination of interests and influences in the prosecution of claims which might have no real foundation.'

And so in *Goodman v. Niblack* (102 U. S., 559-60).

The assignment and power of attorney to Davis are not within the prohibition of the statute. The mischiefs held by the Supreme Court to be aimed at by the statute imply that a claim to be within its intent must involve establishment *by act or participation of the claimant or applicant*, such as production of evidence; for it is at combinations to press and establish claims by fraudulent means and influences, that the statute strikes. Necessarily, the danger thus contemplated can inure only at the hands of claimants and their allies; and the statute has no application except to claims upon the United States lying at large, to be presented, prosecuted, and established by instrumentalities, and liquidated by the aid of processes, within the control or participation of the person applying to Congress, the courts, or the departments in the premises.

This view is sustained by what has been laid down by the Executive Department, as well as by the adjudications already noticed. Thus, in *Brooke's case* (12 Op. Att.-Gen., 216, 220-2), Attorney-General Stanbery held that a judgment of the Court of Claims is not to be considered still

in the light of a claim upon the United States within the meaning of the statute in question, but that such judgment may be freely assigned before the issue of a warrant, &c., notwithstanding that statute; and in expressing this opinion he relies for support on the uniform practice of the Treasury Department.

And another and decisive test in this connection is that pointedly suggested by the decisions of the Supreme Court above noticed, which are all to the effect, that a 'claim' may be assigned, notwithstanding the statute, when the assignment is not within the evils aimed at by the statute. In *Erwin v. United States* (97 U. S., 392), the court said: 'The passing of claims to heirs, devisees, or assignees in bankruptcy is not within the evil at which the statutes aimed,' and is therefore allowable. And in *Goodman v. Niblack*, it was held that passing a claim upon the United States in a general assignment for the benefit of creditors did not come 'within the evil which Congress sought to suppress' by the statute.

The late case of *Bailey v. United States* affords the best instance of the length to which that court has gone in expounding this view. In that case a decree had been passed by a United States Court, on March 25th, 1868, for a sum of money in compensation for an illegal capture by the United States; for the satisfaction of which decree an appropriation by Congress was necessary. The claimants, on February 6th, 1869, gave a power of attorney to one Godeffroy to collect the amount which should be appropriated in satisfaction of the decree. One year and five months later, on July 7th, 1870, the appropriation was made; and thereafter the money was subsequently paid by the Treasury officials to Godeffroy on the power of attorney of February, 1869. Godeffroy failed to account to the claimants for the money, and they brought suit against the United States, asserting the invalidity of the power to Godeffroy, by virtue of the law under consideration, and demanding payment to themselves of the amount appropriated. The court affirmed the action of the Court of Claims in denying their petition.

After citing the preceding cases, the Supreme Court says:

'These cases show that the statutes in question are not to be interpreted according to the literal acceptance of the words used. They show that there may be assignments or transfers of claims against the Government such, for instance, as those passed upon in *Erwin v. United States*, and in *Goodman v. Niblack*, which are not forbidden by those statutes.

In the case before us no question arises as to the transfer or assignment of a claim against the Government. The question is whether payment to one, who has been authorized to receive it by the power of attorney, executed before the allowance of the claim by the act of Congress, was good as between the Government and the claimant, where, at the time of payment, such power of attorney was unrevoked. * * * A mere power of attorney given before the warrant is issued—so long, at least, as it is unexecuted—may undoubtedly be treated by the claimant as absolutely null and void in any contest between him and his attorney in fact, and it may be so regarded by the officers of the Government, whose duty it is to adjust the claim and issue a warrant for its amount. But if those officers choose to make payment to the persons whom the claimant by formal power of attorney has accredited to them, as authorized to receive payment, the claimant cannot be permitted to make his own disregard of the statute the basis for impeaching the settlement had with his agent. * * * An effectual means to [the] end [sought by the statute] was to authorize the officers of the Government to disregard any assignment or transfer of a claim, or any power of at-

torney to collect it, unless made or executed after the allowance of the claim, the ascertainment of the amount due thereon, and the issuing of the warrant for the payment thereof.

In other words, the object being to protect the Government, the statute becomes *functus officio* when the need of such protection is removed; and the Treasury officers, if they see fit and are satisfied that all dangers aimed at by the statute no longer threaten, may recognize an assignment or power of attorney, notwithstanding its execution before the allowance of a claim. This view is in exact accordance with the familiar principle that when the reason of a rule no longer exists, the rule itself will not be applied. *Cessante ratione legis cessat ipsa lex.*

The case under consideration is pre-eminently a case demanding such treatment.

First. There could in this case be no multiplication of persons with whom the Government was to deal. The case was already adjudicated; the claimants were ascertained, and the presentation of their claim in all its details and in every respect was of unalterable record. The Court of Claims was to deal with a case already wholly made up, already presented by claimants already ascertained, on issues already defined, and in the light of evidence already adduced. It was, therefore, impossible to add anything to the case, either as to the record on which it was to be adjudicated, or the persons in respect of whom it was to be presented and urged. There was, then, wholly wanting any possibility of the 'presentation of a single claim by more than a single claimant,' or of 'raising the danger of paying the claim more than once.'

Second. Nor could there be any opening the way to improper influences on the tribunal charged with the adjudication. Apart from the fact that the high character of the tribunal precludes such presumption, there was nothing which any one might do in the direction of the 'combination of interests and influences in the prosecution of a claim which might have no foundation' suggested as the greater danger to be provided against. Such combination could operate only through the production of evidence in support of a claim, and other kindred instrumentalities: for the fraud feared goes to the *foundation* of the claim; and the possibility of corrupting officials, especially judicial officers, not only has never been suggested in this connection, but also it is not to be thought of as in the mind of Congress. Certainly, the greatest danger of manufacturing claims is to be entertained with respect to those presented to Congress; and it would be monstrous to suppose that Congress deemed it necessary to pass that statute to deliver itself from temptation.

The case of this assignment is wholly without the purview of the statute in question; the aim of the memorial and the provision of Congress absolutely excluded all instrumentalities and processes in aid of a conclusion in the matter which a party interested could by any possibility control or in any way participate in, and none of the suggested dangers could threaten the Government in the premises.

It follows from this consideration of the subject:

1. That the power of attorney of February 10, 1875, is irrevocable by Grant;
2. That the power of attorney should not and cannot be disregarded by the Treasury officials; and
3. That the attorney constituted by that power is entitled to receive and collect the warrant issuable in payment of the subject-matter to which it applies."

Hon. Green B. Raum and John B. Sweat for Albert Grant:

“The application of Davis should be denied, for the following reasons in addition to those stated :

I. Because the proposition involved has been refused by the Court of Claims, and by the First Comptroller, and is therefore *res adjudicata*.

II. For the reason that the instruments exhibited by the applicant, purporting to be an assignment and power of attorney, and upon which the application is founded, are declared by law to be, and are, absolutely null and void.

1. In support of the first proposition, attention is called to the facts that, on the 25th day of January, 1883, Davis filed an intervening petition, praying to be heard in connection with the trial of the cause upon identically the same grounds that he now here asks to be recognized as attorney in fact. March 22, 1883, Grant filed a motion to strike Davis's petition from the record.

On April 23, 1883, Davis was notified by the court that the motion to strike his petition from the record would be sustained unless his petition was withdrawn—leave to do which was granted. Whereupon Davis's attorneys—being the same engaged in this proceeding—withdraw the petition.

2. Attention is also called to the Equity cause No. 8,604, Supreme Court of the District of Columbia, the record of which is made a part hereof. In this cause, on the 12th of June, 1883, Browning and others, petitioning creditors, filed a creditor's bill against Albert Grant. The bill prayed for an order to enjoin and restrain the defendant, Grant, from collecting the identical judgment that is the subject of this controversy. On the 25th day of October, 1883, after a full hearing on the bill and answer, the injunction was refused and the bill was dismissed, upon the ground, that a subsequent indebtedness could not be made a lien upon a judgment in favor of the defendant Grant, in the Court of Claims.

3. It is within the knowledge and recollection of the First Comptroller, that some months ago Davis was heard at length by his counsel upon the question now here again presented, and that sufficient cause was not disclosed by Davis for granting his application, to require a response from Grant.

In support of the second proposition—the proposed assignment, power of attorney, and contract between Grant and Davis bear date February 10, 1875, almost eight years prior to the passage of the act of January 5, 1883.

Said assignment and power of attorney are void, because in violation of section 3477, R. S.

Now, if, on the 10th day of February, 1875, Grant had a *claim* upon the United States for about fourteen thousand dollars, and if that claim was the subject of the alleged assignment and power of attorney to Henry S. Davis, as represented in his application herein, it is clear from the law and the facts, that such assignment and power of attorney are void.

In the instrument purporting to be an assignment, the matter purporting to be assigned is called ‘the balance of the *claim* of the said Albert Grant against the United States.’

In the receipt executed by Davis explanatory of the transaction, Davis calls it a claim.

Grant has revoked and annulled said power of attorney. He insists that a power of attorney giving authority to make a valid indorsement

of the draft issued in payment of said judgment must be executed after the date of the action of the Court of Claims in correcting said judgment, if not, in fact, after the date of the draft itself.

When the Court of Claims failed to satisfy the whole claim, left an unpaid, unprovided for, and unascertained balance, and, from any cause, became powerless to afford relief, then Grant certainly had a claimable interest; and when he petitioned Congress for relief, it seems clear that he had a *claim* upon the United States. It was a *claim* for money, and was not less a claim, because in the prosecution of it a particular method for satisfying it was suggested and adopted. But a claim need not be a claim for money, for a *claim* is defined to be 'the assertion of a liability to the party making it to do some service, or pay a sum of money' (16 Pet., 539). It was as certainly a claim upon the United States, as it would or could have been, had Congress been asked to directly appropriate a certain sum of money to satisfy it.

Davis declares this interest to have been 'absolutely nothing.' He probably declares too much for the logic of his position. 'Absolutely nothing' could hardly be the subject of an assignment. A more rational definition of this interest and right is that it was *something*; and that if it was anything it was a claim, and, if a claim at all, must have been a claim upon the United States, and, as such, unassignable.

The literature of Davis's application touching the character of the claim, when it had reached the Court of Claims for re-adjudication, deserves special notice. He says:—

'Only the rectification of the judgment was sought on the evidence already submitted and in the breast of the court, which could not be added to or taken from by one jot or tittle, and in respect of which no consideration could be urged, no instrumentality used, no influence exerted, save only by sheer operation of the thing itself.'

This subtle reasoning on the vitality of the aforesaid 'absolutely nothing' which, by some process, became *something*—by 'sheer operation of the thing itself'—will hardly avail, because the theory is confronted on every hand by the facts. The claim would have forever remained undeveloped, for all that it would or could have done 'by sheer operation of itself.' It would never, of itself, have assumed form and substance. It was as helpless and unwieldy as the majority of claims that are favorably considered by Congress, and it required years of persistent labor to secure the passage of the measure of relief. When this was accomplished, inasmuch as the 'ascertainment of the amount due' was yet to be done, it was still a 'claim upon the United States.' When the Court of Claims resumed jurisdiction of the case, under the provisions of the act of Congress of January 5, 1883, it continued to be a 'claim upon the United States.' (*United States v. Gillis*, 95 U. S., 416.) The case was re-adjudicated on the evidence that had been submitted to the court. The court might, in the exercise of the jurisdiction conferred by the act of Congress, have given judgment for *any sum* not exceeding \$14,016.29, or might have refused to render judgment for any amount whatever, just as they might find from the evidence. The case being as far as possible from 'ascertainment,' continued to be a 'claim upon the United States' until June 11, 1883, when, upon 'ascertainment of the amount due,' the original judgment was corrected.

Reference is made to the opinion in a case reported in 4 Sawyer, 228-9. The language quoted is:

'When the demand is admitted, authorized, or provided for by law, it is not a mere claim, but a debt.'

But this amount was not 'admitted,' for it was resisted by the Attorney-General in the Court of Claims up to the very hour when the judgment was corrected; nor was it 'authorized or provided for by law' within the meaning of that phrase, for if it had been such resistance would have been impossible.

During all these proceedings in Congress and the court, the claim never, 'by sheer operation of itself,' exhibited the slightest vitality; but it maintained its supineness and inactivity throughout all struggles for its success, doing nothing to distinguish it from other 'claims upon the United States.'

The opinion in *United States v. Gillis* (95 U. S., 407), was announced October, 1877, and reviews at length the former decision of that court upon this point. After reciting the material part of section 3477, R. S., the opinion says:

The seventh section enacts that "the provisions of this act," as also those of the prior act of July 29, 1846, entitled "An act in relation to the payment of claims," shall apply and extend to all claims against the United States, whether allowed by special acts of Congress, or arising under general laws or treaties, or in any manner whatever.

No language could be broader or more emphatic than these enactments. The words embrace every claim against the United States, however arising, of whatever nature it may be, and whenever and wherever presented.

* * * * *

We think, therefore, the act of 1853 is of universal application, and covers all claims against the United States in every tribunal in which they may be asserted.

This opinion is to-day the undisturbed judicial interpretation of section 3477 of the Revised Statutes of the United States. It is too perspicuous to be misunderstood. It decides the question now and here under consideration beyond a cavil or a doubt.

In conclusion it is respectfully insisted:

1st. That the questions involved in this proceeding have heretofore been determined in consonance with the views herein presented by the Court of Claims, and afterwards by the honorable First Comptroller, and that the case should be treated as *res adjudicata*.

2d. That the alleged assignment and power of attorney exhibited by the applicant are "absolutely null and void," and

3d. That the application of Henry S. Davis to be recognized as my attorney in fact ought, therefore, to be denied."

DECISION BY WILLIAM LAWRENCE, *First Comptroller*.

The questions involved in this case have been argued with great ability. They arise under section 3477 of the Revised Statutes, which is as follows:

"All transfers and assignments made of any claim upon the United States, or any of part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving pay-

ment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same."

Under this section it is clear, that the assignment and power of attorney executed by Grant to Davis were, and are, void. It may now be regarded as settled law, that the statute against the assignment of claims and against powers of attorney for receiving payments thereof—Revised Statutes, section 3477—generally extends to all claims against the United States, whether liquidated or unliquidated. In the recent case of *Bailey and others v. The United States* (109 U. S., 432), it appeared, that, by a decree made March 25, 1868, by the district court of the United States for the southern district of New York, certain fixed sums were found due from the United States, respectively, to William Bailey and other parties named, on account of the illegal capture of the British steamer *Labuan* and her cargo by a cruiser of the United States. On the 6th of February, 1869, these parties, by power of attorney, constituted A. E. Godeffroy their attorney, with authority to receive said money from the United States. The act of July 7, 1870 (16 Stat., 649), appropriated money to pay the decree. The money was, by the direction of the then First Comptroller, paid by the Treasurer of the United States to the attorney, a proper warrant having first issued in favor of the parties named as creditors in the decree. These parties, claiming that the power of attorney was void, and, therefore, that the payment was unauthorized, sued the United States in the Court of Claims to recover the money. The case having been appealed to the Supreme Court, HARLAN, J., in delivering the opinion of the court, said that:

"A mere power of attorney given before the warrant is issued—so long at least as it is unexecuted—may undoubtedly be treated by the claimant as absolutely null and void in any contest between him and his attorney in fact. *And it may be so regarded by the officers of the government whose duty it is to adjust the claim and issue a warrant for its amount.* But if those officers chose to make payment to the person whom the claimant, by formal power of attorney, has accredited to them as authorized to receive payment, the *claimant cannot be permitted to make his own disregard of the statute* the basis for impeaching the settlement had with his agent."

Thus—to apply what was said to the facts of that case—the Court distinctly held that the power of attorney to receive payment of a sum of money *fixed by decree of court* might be regarded as void "by the officers of the government whose duty it is [was] to adjust the claim and *issue a warrant for its amount.*" They certainly could not treat such power of attorney as void, unless the statute made it so, and so the

statute does. This subject has been elsewhere somewhat fully considered (Claims assignment case, 3 Lawrence, Compt. Dec., 13). The case of Bailey and others v. The United States (109 U. S., 432) further decides, that, if the officers of the Treasury Department, upon the *invitation*, and by the *unrevoked authority*, of the claimant entitled to payment, do, *in violation of law*, make a payment to an attorney, such claimant, who is *in pari delicto*, is *estopped* from saying that the payment was illegal. The law leaves both parties, the officers of the Treasury and the claimant, where it finds them, according to the maxim, *in pari delicto potior est conditio defendentis et possidentis*. Thus, the Government is saved from liability, and is protected, not because the act of its officers in making payment was legal, but because the claimant is in a position, in which he cannot assert the illegality. The principle of *estoppel*, thus asserted, is too well known to require a citation of authorities in support of it. "The law will not assist any one in recovering a demand which originates in a breach or violation, on his part, of its principles and enactments" (Hatch v. Mann, 15 Wend., 46, Simpson v. Bloss, 7 Taun., 246). This principle, so applied, is necessary to prevent collusion between a claimant and his attorney, by means of which payment might be demanded by each in succession. It is not necessary to decide whether the Government could escape liability to the original claimant, if its officers should make payment to an agent *after notice of the revocation* of the power of attorney, which in terms purported to authorize him to receive such payment. A claimant, having given a power of attorney *void in law*, may, perhaps, have a *locus penitentiae*—a right to repudiate his illegal action, on proper notice to the Treasury Department at any time before the execution of the purpose, for which such power of attorney was given. If section 3477 of the Revised Statutes can be held as inapplicable to a decree or judgment, it certainly is applicable to such claim as the one in this case, which purports to be assigned by Grant to Davis. It is urged on behalf of the claimant, Davis, citing Dowell v. Cardwell (4 Sawyer, 228), that section 3477 only applies to "something in the nature of a demand for damages arising out of some alleged act or omission of the Government, *not yet provided for or acknowledged by law*." Such construction has never been adopted in the Treasury Department, and is in direct opposition to the statute, and to the opinions of the Supreme Court. It would practically nullify the statute. But if such construction be adopted, it is fatal to the claimant, Davis. The claim, which Grant assumed to have when he made the so-called assignment to Davis, certainly was "not * * * provided for or acknowledged by law." The assignment of *such claim*, if recognized as valid, will defeat the purposes which the statute was designed to carry out. Thus, the Supreme Court in Goodman v. Niblack (102 U. S., 560) said that the mischiefs designed to be remedied by the statute "are mainly two":

"First. The danger that the rights of the government might be embarrassed by having to deal with *several persons* instead of *one*, and by the *introduction of a party who was a stranger to the original transaction*.

Second. That, by a transfer of such a claim against the government to one or more persons *not originally interested* in it, the way might be conveniently opened to such improper influences in *prosecuting the claim before the departments, the courts, or the Congress*, as desperate cases, when the reward is contingent on success, so often suggest.

Both these considerations, as well as a careful examination of the statute, leave no doubt that its sole purpose was to protect the government, and not the parties to the assignment."

If the assignment to Davis be recognized, the Government will be embarrassed "*by the introduction of a party who was a stranger to the original transaction.*" The assignment might open the way "to such improper influences in prosecuting the claim before * * *, the courts, or the Congress, as desperate cases, when the reward is contingent on success, so often suggest."

It is urged that an assignment does not offend against the statute, unless the claim involves "establishment by act or participation of the claimant." This claim does involve such establishment, unless it be assumed that the original claimant will be indifferent to its success; and what is worse, it invites all the influences, which its purchaser could exert upon Congress and the courts. The statute was manifestly designed to prevent the enlistment of outside influences in favor of a claim—that is, the influence "of a party who was a stranger to the original transaction."

It is claimed that the power of attorney to Davis is irrevocable. But it is void, and needs no revocation; and it is inoperative for other reasons (Clift's case, 2 Lawrence, Compt. Dec., 2d ed., 187).

Such power of attorney cannot be operative against the "regulations" of the Treasury Department. These provide, as to drafts issued in payment of judgments of the Court of Claims, that:—

"The persons certified by said court as the attorneys of record shall be regarded as such by this [the Treasury] Department, and be *entitled to receive the drafts in such cases*" (Clift's case, 2 Lawrence, Compt. Dec., 2d ed., 193).

The Court of Claims has certified another party as such attorney. He is dead. His legal representative has no right to the custody of the draft, which may be issued to pay the judgment in this case; because the regulations create a *personal trust* in the attorney of record, which is not transferable. But it does not follow that such draft must necessarily be given to a party having a power of attorney to receive it, executed prior to the rendition of a judgment, and in direct conflict with the "regulations." On grounds of public policy, without reference to the statute, it is by no means certain that the assignment and power of attorney are not *void*; because the subject-matter thereof was without legal existence when they were executed. This question has not been argued in the present case, and it is unnecessary to decide it. A standard elementary writer, in treating of the law of sales, has said, as to *tangibilities*, that:—

"The existence of the thing to be sold, or the subject-matter of the contract, is essential to the validity of the contract * * *. A mere

contingent possibility, not coupled with an interest, is no subject of sale" (1 Parsons, Cont., 6th ed., 522, 523, citing authorities; Screws v. Roach, 22 Ala., 675; Carleton v. Leighton, 3 Meriv., 667).

In Hart v. Gregg (32 Ohio, St., 502) it was held, that:—

"The conveyance by a son of his expectancy in land, owned by his father, * * *, is the conveyance of a mere naked possibility not coupled with an interest, and passes no estate or interest in the land."

It was said, *per* Lawrence *arguendo*, that:—

"This is so on grounds of public policy, (a) to prevent the sacrifice of expectant estates; * * * ; (c) to prevent clouds on title passing by devise and descent; (d) and for the safety of life, which requires that the law should give no inducement to those who are without the ties of kindred and of blood to the holders of property to desire their death."

And the court said:—

"It is well settled that, where no estoppel arises from warranty, recital, or otherwise, a release or conveyance operates only on *existing rights*."

See Fussell v. Hughes, decided by Matthews, J., in circuit court of the United States for the northern district of Ohio, August, 1881 (68 Federal Reporter, 384; House Mis. Doc., No. 42—1st session, 47th Congress). The same principle applies to intangibilities, as choses in action. Thus, in Robinson v. Macdonnell (5 Mau. and Sel., 228), "it was held, that an assignment of the freight, earnings, and profits of a ship, does not extend to the profits not in existence, actual or potential" (1 Parsons, Cont., 6th ed., 522, *note*).

In that case C. assigned to S. the freight, earnings, and profits of the ship W., which ship *afterwards*, in a voyage to the South Seas, obtained a quantity of oil, the produce of whales taken in the voyage. The question was, whether the oil passed to S. by the assignment. The decision did not turn solely on the *construction* of the *terms* of the assignment as to the *intention of the parties to it*; but the court decided upon the *effect of the assignment*, if its purpose had been to pass the oil. Lord Ellenborough, C. J., said that:—

"There is still another objection, however, to the claim of the oil under the deed of 15th December, 1810, which is this, that the oil had no existence, actual or potential, at the time this deed was made; and to make a grant or assignment valid, the thing which is the subject of it must have an existence, actual or potential, at the time of such grant or assignment; and upon this principle, an assignment of sheep which a lessee was to deliver to the assignor at the end of the lessee's term, or of the wool which should grow upon such sheep as the assignor should thereafter buy, has been held inoperative, because the assignor had not, at the time of the assignment, that which he was professing to assign, either actually or potentially, but in possibility only. Wood and Foster's case, 1 Leon. 42, and Grantham v. Hawley, Hob. 132. Now here, at the time of this assignment, Clarkson and Parker had no property, actual or potential, in this oil; it was altogether matter of chance whether any of it would have been obtained; and even the voyage in which it was obtained does not appear to have been in contemplation. For these

reasons, we think the defendants have no claim under the deed of 15th December, 1810."

The assignment and power of attorney from Grant to Davis were without any *existing right*, on which to operate; that is, there was no right existing at law, or on principles of equity jurisprudence. The argument for Davis puts and answers an inquiry thus: "After the judgment of the Court of Claims in the premises, what had Grant in respect of which he might assert a 'claim upon the United States'! *Absolutely nothing.*" This is true. The real question, therefore, which is now presented, is, whether an assignment of "*absolutely nothing*" amounts to *something*? *Ex nihilo nihil fit.* The expectancy arising from "hope deferred" is not vendible. It rests *in nubibus*. It is not the subject-matter of a power of attorney. In somewhat similar cases it might often be described as "such stuff as dreams are made on," as in "Tempest," in which, after the end has been reached the parties soliloquizing say:

"Our revels now are ended. These our actors,
As I foretold you, were all spirits, and
Are melted into air, into thin air:
And, like the baseless fabric of this vision,
The cloud-capp'd towers, the gorgeous palaces,
The solemn temples, the great globe itself,
Yea, all which it inherit, shall dissolve,
And, like this insubstantial pageant faded,
Leave not a rack behind. We are such stuff
As dreams are made on, and our little life
Is rounded with a sleep."

The speculation in such airy possibilities must inevitably be attended with sacrifice by the vendor or loss by the purchaser. In effect in the event of *failure*, such speculation may be even more unjust to the vendee than champerty, in which he only risks his services and the cost of prosecuting a suit, while in such case as this he may lose, besides these, the consideration paid the vendor. Even in the event of *success*, the vendor will generally be in cases of this sort, subjected to enormous sacrifice. It cannot be possible, that the policy of the law sanctions, or gives effect to, such transactions, which have the legal character of a *bet* on future possibilities. When parties are legally in *pari delicto*, the law leaves them as it finds them and gives no relief to either. The *legal* effect of these transactions is alone referred to, since the good faith of the parties, who are highly respectable, is not at all called in question.

It may be safely concluded, that contracts will, by *construction*, generally be held as only *intended* to apply to existing rights; that, when in terms they are made and intended to be applicable to *expectancies*, which are merely naked possibilities, they are inoperative, at least, unless made operative by warranty or recital, in good faith upon a sufficient consideration; and that, when in terms they are made and intended to apply to rights, which have no legal existence, and which can

have none, except by force of a law to be thereafter passed, they are void on grounds of public policy.

The claimant, Davis, is not entitled, either to payment, or to the possession of any draft, which may be issued in this case.

TREASURY DEPARTMENT,

First Comptroller's Office, May 23, 1884.

IN THE MATTER OF POWERS OF ATTORNEY TO INDORSE AND COLLECT
TREASURY DRAFTS AND DISBURSING OFFICERS' CHECKS.—ATTORNEY-
INDORSEMENT CASE.

1. Section 3477 of the Revised Statutes declares that a power of attorney to indorse a Treasury draft issued to make payment of any claim against the United States is "absolutely null and void," unless such power of attorney is made and executed "after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof."
2. No valid power of attorney can be made in any case or at any time to indorse the name of the payee on a disbursing officer's check, issued to pay a claim against the United States, not yet audited and allowed by the proper accounting officers; and this is applicable to corporations as well as to natural persons.
3. But the proper financial officer of a corporation, whose authority is subsisting, may, without reference to the time of his appointment, receive payment of a Treasury warrant, or indorse and collect a draft issued to make payment thereof, and may also indorse and collect a disbursing officer's check.
4. A valid power of attorney may be executed, however, at any time, to indorse negotiable Treasury drafts and disbursing officers' checks, not originally payable to the maker of such power, and which have already been indorsed by the payee.

March 11, 1884, a power of attorney was duly executed by a party, in terms authorizing the agent therein named to indorse, and receive payment of, all drafts and checks payable by the Treasurer, assistant treasurer, or any designated depository, of the United States. The Treasurer of the United States asks the First Comptroller to decide whether the agent can, under this power of attorney, indorse drafts and checks of the character mentioned.

OPINION BY WILLIAM LAWRENCE, *First Comptroller*:

Section 3477 of the Revised Statutes provides, as follows:—

"All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and

powers of attorney must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same."

It is very certain, that, if a party has a claim against the United States, no valid power of attorney can be executed, in advance of "the issuing of a warrant for the payment thereof", to indorse any draft, which may thereafter be issued payable to his order for the payment of such warrant. Nor can a valid power of attorney be made, in any case, or at any time, by a claimant, to indorse a disbursing officer's check issued to pay an amount due such claimant by reason of his claim against the United States, not yet audited and allowed by the proper accounting officers.

Such power of attorney is not valid, even if executed after the issuing of the disbursing officer's check. Reasons for so holding have been given elsewhere (Claims-Assignment case, 3 Lawrence, Compt. Dec., 32). One purpose of section 3477 of the Revised Statutes generally is, to enable the Government to deal directly with the *original owner of a claim against it*. This becomes especially important in issuing a duplicate, as authorized by section 3646 of the Revised Statutes, "whenever any original check is lost, stolen, or destroyed." Section 3645 of the Revised Statutes is applicable in terms to Treasurer's drafts, but shows a purpose to prevent disbursing officers' checks also from "being used or thrown into circulation as a paper currency or a medium of exchange." The act of February 27, 1877 (19 Stat., 249), requires disbursing officers to "draw" for public money "only in favor of the persons to whom payment is made." In practice, however, the checks so drawn are payable to order. Assuming that this is warranted by law, the result is, that the statutes giving power to draw checks *so negotiable* thus authorize the *payee therein to personally* indorse checks so drawn, and, in *that mode*, and *to that extent*, to assign a claim, as evidenced by the check, against the United States. An *exception* is thus engrafted on section 3477 of the Revised Statutes. But the *exception* does not go beyond the *mode* and *extent* stated. The *prohibition* of section 3477 *against powers of attorney* "for receiving payment of any such claim" remains. A check is evidence of a claim. The assignment of a check carries with it the right "for receiving payment," and would be prohibited by section 3477, if it were not for the *exception* created, as stated, by which the payee in person can assign the check. But the mode of assignment authorized by the exception so made is by the indorsement of the payee in person, and to the general prohibition against an indorsement under the authority of a power of attorney there is no exception. Such general prohibition remains as declared by section 3477 of the Revised Statutes. This is supported by reasons of commercial convenience. And hence, it follows,

as stated, that a power of attorney to indorse a disbursing officer's check is not valid, even though made after the issuing of such check. It may be said, however, that, if payment be made by the Treasurer or other depositary, on whom such check is drawn, on an indorsement of the check made under the authority of an unrevoked power of attorney, without objection by the maker thereof, the latter will be estopped from asserting the invalidity of such power of attorney, and, so, the payment will, in such case, have effect, as if legally made. (*Bailey v. United States*, 109 U. S., 439; Judgment-Assignment case, *ante*, 106; Grant and Davis case, *ante*, 116.)

If effect were given to such powers of attorney, the result would be, to permit claims to be assigned before "the issuing of a warrant for the payment thereof," which is expressly prohibited by the statute (Claims-Assignment case, 3 Lawrence, Compt. Dec., 13). The prohibition of the statute also extends to corporations, whose proper officer, however, whensoever appointed, may indorse and collect a draft issued to make payment of a warrant in favor of the corporation, and may also indorse and collect a disbursing officer's check issued payable to the order of such corporation (*Id.*, 30). A corporation may appoint as many financial officers as its charter authorizes. But a *general* power of attorney to indorse negotiable Treasury drafts and disbursing officers' checks not originally payable to the maker of such power is valid—that is, a party, whether a natural person or a corporation, may execute a power of attorney to indorse and collect a Treasury draft, issued to pay any claim against the United States in favor of any other party, after such draft has been indorsed by the payee therein; and it is no objection to the power in such case, that it was executed before "the allowance of such a claim, the ascertainment of the amount due, * * * [or] the issuing of a warrant for the payment thereof." So a general power of attorney to indorse, and receive payment of, disbursing officers' checks payable to any claimant, after such check has been indorsed by the claimant-payee therein, is valid. So a valid power may be executed to assign registered bonds of the United States. Section 3477 of the Revised Statutes does not apply to such powers as these (Claims-Assignment case, 3 Lawrence, Compt. Dec., 35).

In preparing powers of attorney, it may become important to leave no room for doubt as to whether they should extend to drafts and checks issued prior to the execution thereof, as well as to those subsequently issued.

On the question submitted for an opinion, the Treasurer will be advised in accordance with the principles stated.

TREASURY DEPARTMENT,

First Comptroller's Office, April 7, 1884.

IN THE MATTER OF THE RIGHT OF THE UNITED STATES TO COLLECT AN INTERNAL-REVENUE TAX, UNDER THE ACTS OF JUNE 30, 1864 (13 STAT., 285, 286, SECS. 124, 125), AND JULY 13, 1866 (14 STAT., 140, SEC. 9), ON THE PROFITS ARISING UPON A LEGACY BETWEEN THE PROBATE OF THE WILL BEQUEATHING IT, AND THE PAYMENT THEREOF.—LEGACY-TAX CASE.

1. Under the internal-revenue acts of June 30, 1864 (13 stat., 285, 286, secs. 124, 125), and July 13, 1866 (14 Stat., 140, sec. 9), a legacy-tax is not chargeable on the profits accruing upon a legacy between the date of the probate of the will giving such legacy and the date of the payment thereof.
2. Acts of Congress imposing internal-revenue taxes are not to be extended beyond the reasonably necessary import of their terms.

Thomas Wells, of Nashville, Tenn., having made his last will and testament with sundry bequests therein, died in 1868. The will was admitted to probate, and D. S. Graves qualified as executor. A litigation followed as to the competency of one of the legatees, during which the *income* on the funds bequeathed amounted to \$10,050.63, which, with the principal bequeathed, amounted in all to \$31,755.46 on November 15, 1875, when it was distributed among the legatees. An internal-revenue tax of \$1,038.11 on the whole sum of \$31,755.46 was assessed and collected from D. S. Graves, executor, in 1875, under the act of June 30, 1864 (13 Stat., 285, 286, secs. 124, 125), as amended by the act of July 13, 1866 (14 Stat., 140, sec. 9). The executor made a claim for a refund of \$307.80 of the sum as assessed and collected, as for tax illegally collected on said sum of \$10,050.63, the latter sum being the amount of profits arising on the legacies between the date of the probate of the will and the date of the payments of such legacies. The question is now presented to the First Comptroller to decide whether this claim shall be paid.

Charles F. Benjamin submitted an argument for the claimant, and cited *May v. Slack* (16 Internal Revenue Record, 134), *Mason v. Sargent* (23 *Id.*, 155), and *The United States v. The New York Life Ins. and Trust Co.* (24 *Id.*, 118).

DECISION BY WILLIAM LAWRENCE, *First Comptroller*.

In *Adams et al. v. Bancroft* (3 Sumner, 387) Mr. Justice Story says that:

“Laws imposing duties are never construed beyond the natural import of the language; and duties are never imposed upon the citizens upon doubtful interpretations; for every duty imposes a burthen on the public at large, and is construed strictly, and must be made out in a clear and determinate manner from the language of the statute.”

The act of June 30, 1864 (13 Stat., 285, sec. 124), imposes an internal-revenue tax upon "any legacies or distributive shares arising from personal property, where the whole amount of such personal property, * * *, shall exceed the sum of one thousand dollars in actual value, passing, * * *, either by will or by the intestate laws of any State or Territory", &c. This tax is "payable whenever the party interested in such legacy * * * shall become entitled to the possession or enjoyment thereof, or to the beneficial interest in the profits accruing therefrom"; and the tax is made "a lien and charge upon the property * * *, for twenty years, or until the same [tax] shall, within that period, be fully paid to * * * the United States" (Act June 30, 1864—13 Stat., 286, sec. 125; Act July 13, 1866—14 Stat., 140, sec. 9; *Mason v. Sargent*, 104 U. S., 690; *Clapp v. Mason*, 94 U. S., 589). This manifestly contemplates a tax, in such case as this, only on the *principal sum* of the legacy, and not on "the profits accruing therefrom." The *amount* which is taxable is the legacy as it exists at the *time* when the legatee "shall become entitled to the possession", &c. This *time* is *that* lawfully fixed by the testator, and not the *time* as delayed by litigation.

This conclusion is fortified by an examination of the cases adjudged by the courts in relation to legacy-taxes. The usage in the Treasury Department has been in accordance with the conclusion stated. This seems reasonable, because the same act, which taxes legacies, provides for a tax on annual gains, profits, or incomes in excess of six hundred dollars (Act June 30, 1864—13 Stat., 281, sec. 116). It cannot well be assumed that Congress intended to impose duplicate taxes on the same income or profits.

In England it has been held, under the statute of 36 Geo. III, c. 52, sec. 35, that "the crown is entitled to duty on the interest accrued on the legacies and residue, where payment is deferred." (Tilsley, Stamp Laws, London, 1850, p. 699, citing *The Attorney-General v. Cavendish*, Wight., 82, *per* Chief Baron Macdonald; *Thomas v. Montgomery*, 3 Russ., 502). Tilsley also cites *Adv. Gen. v. Oswald* as "a case recently decided in the Exchequer in Scotland", in which it was held, that "accumulations consisting chiefly of sums recovered * * * in actions against persons for infringing a patent were chargeable with duty." (Tilsley, Stamp Laws, London, 1850, p. 674, *note*.) But the English statutes, on which these decisions were made, are essentially different from those now under consideration.

The claim in this case is allowed.

TREASURY DEPARTMENT,

First Comptroller's Office, February 26, 1884.

IN THE MATTER OF THE COMPENSATION OF A UNITED STATES DISTRICT ATTORNEY UNDER SECTION 838 OF THE REVISED STATUTES.—DISTRICT ATTORNEY'S CASE.

1. Section 838 of the Revised Statutes does not authorize compensation to a United States District Attorney for services *during the trial of any case* therein mentioned—no matter how prolonged—in addition to the regular fees authorized by section 824 of the Revised Statutes.
2. Said section 838 authorizes compensation to United States District Attorneys for services and expenses *preparatory to trial* in cases therein mentioned, when “such cases are tried or disposed of” before the proper judge.
3. The claim of a United States District Attorney for compensation under section 838 of the Revised Statutes cannot be allowed by accounting officers, unless such claim has first been approved by the Secretary of the Treasury “upon the certificate” of the proper judge.
4. The Secretary of the Treasury will not approve any claim of a United States District Attorney for compensation under section 838 of the Revised Statutes in any case not “tried or disposed of,” before the proper judge. Hence, when no prosecution is instituted, compensation cannot be allowed for “inquiry and examination” by a United States District Attorney to determine whether cases reported to him by collectors of internal-revenue for violations of internal-revenue laws shall be prosecuted in court.
5. Keasbey's case (1 Lawrence, Compt. Dec., 2d., ed., 172), Leake's case (2 *Id.*, 445), and Connolly's case (4 Lawrence, Compt. Dec., 45) explained.

September 6, 1883, the District Judge of the United States for the southern district of Illinois certified for payment, under section 838 of the Revised Statutes, an account for \$1,452.50 against the United States in favor of James A. Connolly, United States District Attorney for said district, for professional services in 180 cases reported to him by collectors of internal-revenue for fines, penalties, and forfeitures incurred under the internal-revenue laws. This account was duly received by the Commissioner of Internal Revenue, who, on the 12th of October, 1883, transmitted it to the Secretary of the Treasury with the recommendation that it be approved by him for the full amount thereof. October 18, 1883, it was approved accordingly, and was referred to the Fifth Auditor for examination and report. October 20, 1883, it was audited and reported by the Fifth Auditor to the First Comptroller for his decision thereon. November 7, 1883, the First Comptroller returned the account to the Secretary, directing his attention to the “fact, that in all the cases mentioned, which were *tried or disposed of* in court, the District Attorney has heretofore been allowed [\$1,005], the [docket] fees prescribed by section 824 of the Revised Statutes.” February 26, 1884, the Secretary of the Treasury addressed a letter to the First Comptroller, as follows:—

“With your letter of November 7, 1883, you returned the account of James A. Connolly, United States Attorney for the Southern District

of Illinois, for services under section 838, R. S., which had been approved to the amount of \$1,452.50, and referred October 18, 1883, to the Fifth Auditor for settlement, &c., with the information, that Mr. Connolly had already been allowed the [docket] fees prescribed by section 824, R. S., in all the cases included in the account, which were 'tried or disposed of' in court, amounting in all to \$1,005 [for said docket fees]; which amount [of \$1,452.50] he claimed for *additional* compensation under said section for services in preparing the cases for trial.

This fact had not, as you correctly suppose, been specially mentioned to me when the account was approved and referred. In returning the account for my reconsideration you say that you 'do not question his right to such compensation as the judge of the proper court and the Secretary of the Treasury may allow in such cases, although it is doubtful whether Congress intended to authorize allowances for any cases except such as the District Attorney decides, upon inquiry and examination, that prosecutions cannot probably be sustained, or that the ends of public justice do not require that they should be instituted.'

I find that this account includes not only charges for services preparatory to trial in cases that were tried, but also for services in cases which were not tried or disposed of by the judge.

While this account and others similar to it have been under consideration, my attention has been specially called to the question as to whether section 838 authorized any allowance in the last named class of cases. After carefully considering that section, it appears clear to me that there could be no jurisdiction in the Secretary of the Treasury, and, hence, no power to make an allowance, unless there is a judge's certificate, and that no judge could give the required certificate except in cases that are tried or disposed of before him.

I am now informed that this question was submitted to Secretary Bristow in 1874, as it arose under the act of March 3, 1873 (17 Stat., 581), from which this section 838 was taken. In a letter dated August 29, 1874, to George Willey, Esq., United States Attorney at Cleveland, in reference to an account of this kind presented by him April 4, 1874, Secretary Bristow said: 'As the bill * * * is wholly for services in cases where legal proceedings were not commenced, and which consequently were not "tried or disposed of" before any judge, it cannot, as I understand the law, be paid.' In 1877 this ruling was ratified and approved by Secretary Sherman and Comptroller Tayler. It appears, furthermore, that two other rulings in construction of the same section were made by Secretary Bristow in 1874, and approved by Secretary Sherman and Comptroller Tayler in 1877, viz:

First, that the act of 1873 (now section 838) did *not* allow compensation for services *during the trial* (no matter how prolonged) *in addition* to the regular fees under the act of February 26, 1853 (10 Stat., 161), now section 824; and

Second, that said act of 1873 *did* allow compensation for services and expenses *preparatory* to trial in cases that were 'tried or disposed of before' a judge, in addition to the regular fees allowed for trial under the fee bill (now section 824).

My attention has been called to the fact, that, on the question of allowance for services in cases not prosecuted, and not tried or disposed of before a judge, you have expressed a different opinion from that so long followed by the Department, in three printed decisions, viz: in *Keasbey's case*, Vol. I, [2d ed.], p. 172; *Leake's case*, Vol. II [2d ed.], p. 445; and *Connolly's case*, Vol. IV, p. 45. An examination of the accounts presented in those cases shows, however, that every case

charged for had been tried or disposed of by a judge, and in every case the regular fee had been allowed under section 824; and the *only* question, so far as section 838 was involved, was, as to the allowance of an additional fee under that section for services in making inquiry and examination *preparatory* to trial. Consequently, the question as to compensation in cases not tried or disposed of by a judge was not raised, and did not call for a decision in either of the three accounts mentioned.

As there appears to me to be no sufficient ground for reversing the above mentioned rulings of this Department, I have decided to adhere to them and apply them in all cases that may hereafter be presented.

"I have this day approved the account of Mr. Connolly for the sum of \$1,005.00, having cancelled my former approval of \$1,452.50, and disallowing all the charges for cases not tried or disposed of before a judge, amounting to \$405.00, and the charges for attendance before a United States commissioner amounting to \$42.50. The account is herewith returned for your action."

The account is thus presented for the action of the First Comptroller.

DECISION BY WILLIAM LAWRENCE, *First Comptroller*.

The account in this case will be settled on the principles stated by the Secretary of the Treasury. It is clear that section 838 of the Revised Statutes applies to all the cases stated by the Secretary. The Comptroller has already so held (Keasbey's case, 1 Lawrence, Compt. Dec., 2d ed., 172; Leake's case, 2 *Id.*, 445; Connolly's case, 4 Lawrence, Compt. Dec., 445). If an allowance should be made in a case to which the statute does not apply, the Comptroller would, of course, be required to so decide, and to reject the allowance. But in view of the concurrence in opinion above mentioned no such allowance is possible.

The Revised Statutes contain the following provisions:—

"Sec. 823. The following and no other compensation shall be taxed and allowed to attorneys, solicitors, and proctors in the courts of the United States, to district attorneys, clerks of the circuit and district courts, marshals, commissioners, witnesses, jurors, and printers in the several States and Territories, except in cases otherwise expressly provided by law.

FEEES OF ATTORNEYS, SOLICITORS, AND PROCTORS.

"Sec. 824. On a trial before a jury, in civil or criminal causes or before referees, or on a final hearing in equity or admiralty, a docket fee of twenty dollars:

For each day of his necessary attendance in a court of the United States on the business of the United States, when the court is held at the place of his abode, five dollars; and for his attendance when the court is held elsewhere, five dollars for each day of the term.

For traveling from the place of his abode to the place of holding any court of the United States in his district, or to the place of any ex-

amination before a judge or commissioner, of a person charged with crime, ten cents a mile for going, and ten cents a mile for returning.

When an indictment for crime is tried before a jury and a conviction is had, the district attorney may be allowed, in addition to the attorney's fees herein provided, a counsel fee, in proportion to the importance and difficulty of the cause, not exceeding thirty dollars.

* * *

"Sec. 838. It shall be [the] duty of every district attorney to whom any collector of customs, or of internal revenue, shall report, according to law, any case in which any fine, penalty, or forfeiture has been incurred in the district of such attorney for the violation of any law of the United States relating to the revenue, to cause the proper proceedings to be commenced and prosecuted without delay, for the fines, penalties, and forfeitures in such case provided, unless, upon inquiry and examination, he shall decide that such proceedings cannot probably be sustained, or that the ends of public justice do not require that such proceedings should be instituted; in which case he shall report the facts in customs cases to the Secretary of the Treasury, and in internal-revenue cases to the Commissioner of Internal Revenue for their direction. * And for the expenses incurred and services rendered in all such cases, the district attorney shall receive and be paid from the Treasury such sum as the Secretary of the Treasury shall deem just and reasonable, upon the certificate of the judge before whom such cases are tried or disposed of * * *."

In Connolly's case (4 Lawrence, Compt. Dec., 45) it was said:—

"An allowance may be made under section 838 of the Revised Statutes in favor of an United States District Attorney, for 'inquiry and examination,' to determine whether cases reported to him by collectors of internal revenue for violations of the internal-revenue laws shall be prosecuted in court, in those cases in which the attorney, after the requisite examination, reports the facts to the Commissioner of Internal Revenue, although no proceedings in court are instituted."

That case itself did not involve the question thus stated therein, and, hence, such question cannot be said to have been *decided*. The principle so stated in that case was discussed upon what was understood to be the usage which had prevailed. But whatever may be the true construction of section 838 of the Revised Statutes,* it is clear, that a claim under it cannot be allowed by the accounting officers, unless such claim has first been approved by the Secretary of the Treasury "upon the certificate" of the proper judge; because this section expressly says, as to the cases to which it applies, that:—

"For the expenses incurred and services rendered in all such cases, the district attorney shall receive and be paid from the Treasury such sum as the Secretary of the Treasury shall deem just and reasonable, upon the certificate of the judge before whom such cases are tried or disposed of."

* If the question of the proper construction of section 838 were *res integra*, there would be much of authority to support the view, that the compensation of district attorneys in the cases, to which said section applies, is to be fixed *exclusively* in the mode therein stated; and that no compensation in such cases can be paid under section 824. The latter section prescribes fees for the trial of cases generally, section 838 prescribes the mode of fixing the fees to be paid for all services in a separate and particular class of cases; and it may well be urged, that these latter cases are excepted from the operation of section 824 (Huidekoper's case (second), 3 Lawrence, Compt. Dec., 160, and cases there cited).

In such cases, the Secretary is, upon the requisite certificate, made the sole judge of the amount to be paid. Accounting officers have no discretion in fixing the amount. Even if it should be held, that section 838 authorizes compensation for "inquiry and examination" in cases in which no prosecution is instituted in court, yet no payment could be made, unless the amount thereof was fixed by the Secretary of the Treasury. It is now ascertained, that the *usage* has been not to allow compensation in such cases; and this usage should not be changed, unless *clearly* wrong, which is by no means the case.

As above decided, the account in this case will be settled in accordance with the principles stated.

TREASURY DEPARTMENT,

First Comptroller's Office, February 29, 1884.

IN THE MATTER OF THE RIGHT OF SUPERINTENDENTS, CLERKS, AND POLICEMEN TO EXTRA COMPENSATION UNDER THE ACT OF MAY 18, 1872, (17 Stat., 134, sec. 2).—EIGHT-HOUR LAW CASE.

1. Superintendents, clerks, and policemen are not entitled to extra compensation under the act of May 18, 1872 (17 Stat., 134, sec. 2).
2. Superintendents, clerks, and policemen are neither laborers, workmen, nor mechanics within the meaning of said act.
3. The decisions of these questions belong to the Comptrollers by virtue of the authority conferred upon them by law.
4. No authority is given to any other department or officer to interpose between the Comptrollers and the execution of said act of May 18, 1872, according to their best judgment of its import.
5. The Comptrollers will treat an opinion of the Attorney-General on such subject with great respect, and allow it such weight as it may be justly entitled to when considering questions which come to them for decision, but they are under no obligation of law or of courtesy to follow it.

Charles A. Gregg and George Mills, clerks in the Watertown arsenal, whose names were stricken from the roll for payment of employes at the arsenal, who are entitled to extra compensation under the provisions of act approved May 18, 1872, appealed to the Comptroller, and their letter was returned to Lieutenant-Colonel T. T. S. Laidley, commanding the arsenal, with the following indorsement:

"Respectfully returned.

"The First Comptroller has decided that superintendents, clerks, and policemen are not embraced in the act of May 18, 1872, as they are neither laborers, workmen, nor mechanics; and in that decision this office concurs.

"E. B. CURTIS,
"Acting Comptroller.

"SECOND COMPTROLLER'S OFFICE,
"September 7, 1872."

PAY-ROLLS OF "LABORERS, WORKMEN, AND MECHANICS;" ACT OF
MAY 18, 1872.

If any of the "laborers, workmen, and mechanics" were put on the rolls by another name, they cannot be deprived of their rights by the misnomer, but are entitled to the allowance. I think you are right in the suggestion that all from whose pay a deduction was made, by any construction of the act of June 25, 1868, should have it restored to them, as the deduction could not have been made under that law had they not been considered "laborers, workmen, or mechanics."

J. M. BRODHEAD,
Comptroller.

SECOND COMPTROLLER'S OFFICE,
October 4, 1872.

TREASURY DEPARTMENT,
FIRST COMPTROLLER'S OFFICE,
October 21, 1872.

SIR: I have the honor to acknowledge the reference to this office of the letter of Charles A. Gregg, addressed to the President, under date of September 24, 1872, and other papers, with the request that the Comptroller will communicate to the War Department his views as to the application of the act of Congress of May 18, 1872, to the classes of claimants enumerated in the papers.

By the act of June 25, 1868 (15 Stat., 77), it was enacted "That eight hours shall constitute a day's work for all laborers, workmen, and mechanics now employed or who may be hereafter employed by or on behalf of the Government of the United States."

By proclamation of May 19, 1869, the President directed that from and after that date no reduction should be made in the wages paid by the Government by the day to such laborers, workmen, and mechanics on account of such reduction of the hours of labor. This direction was repeated in the proclamation of May 11, 1872.

By section two of the act of May 18, 1872, pamphlet laws, 13, the accounting officers were authorized and required, in case the wages of the laborers, workmen, and mechanics had been reduced between June 25, 1868, and May 19, 1869, to pay them such reduction when it should be made to appear that the reduction of the hours of labor "was the sole cause of the reduction of the wages."

Mr. Gregg and three other persons were employed as clerks at the Watertown arsenal, at a compensation of \$4 per day. After the passage of the act of June 25, 1868, they continued in the discharge of their clerical duties as before, ten hours per day, and at \$4 compensation. They now ask to be paid at the rate of \$4 for eight hours' work, or \$5 for the day of ten hours.

You will note that the authority to pay contained in the act of May 18, 1872, is limited to cases where the rate was reduced because of the reduction of the hours of labor. In the present instance neither the hours of labor nor the rate of compensation were reduced.

But are clerical employes within the provisions of the act of June 25, 1868?

Mr. Gregg insists that a clerk who labors at the desk for ten hours a day is to all intents and purposes a laborer or a workman, and entitled to the benefits of the act. He insists that the law was not intended for

one class, but for all who were in the employ of the Government during the time specified in the act, who were hired and paid by the day of ten hours, and who worked that time, whether they were running a machine, handling a pen, or using a shovel.

The persons described in the law are "laborers, workmen, and mechanics." These words have fixed and known definitions, not only in the law, but in the minds of all men also. A laborer is one who performs common labor, requiring physical ability, but no particular skill. A mechanic is one who also requires physical ability, which he controls with skill. The term "workmen" embraces both of the other classes. He may be a skilled or an unskilled workman; nevertheless, physical labor is his employment, whether directed by skill or not.

That the clerks were employed and paid by the day is of no importance in deciding the question presented. If a laborer, workman, or mechanic is employed by the year, or the month, or the day, the hours of labor are the same. If employed by the day, he may be discharged at night; if by the month, at its end; or if by the year, at its termination. The day, under the laws of Congress, consists of eight hours. There is a certain number of days to the month, and of months to the year.

The intention of Congress, beyond question, was to reward those engaged in labor requiring physical exertion, as distinguished from employment requiring mental culture.

My conclusion, therefore, is, that the terms "laborers, workmen, and mechanics," as used in the acts of Congress, are to be taken, according to their common acceptation, as embracing only those who are engaged in physical employments, and as excluding all others.

I am, very respectfully,

R. W. TAYLER,
Comptroller.

HON. W. W. BELKNAP,
Secretary of War.

The papers are herewith returned.

DEPARTMENT OF JUSTICE,
Washington, October 24, 1872.

SIR: I have duly considered the question proposed by you to this Department in your letter of the 23d instant in regard to the proper construction of the act of May 18, 1872, section 2 (17 Statutes at Large, 134).

By the act of June 25, 1868, (15 Statutes at Large, 77,) it was enacted "That eight hours shall constitute a day's work for all laborers, workmen, and mechanics now employed, or who may be hereafter employed, by or on behalf of the Government of the United States." Under this act it was at first a question whether it was the intention of Congress that persons who worked only eight hours a day should receive the full compensation which had previously been given for a day's work, and at first full payment was not allowed them. Afterwards, by proclamation of the President, full wages for a day's work were allowed to all persons, although under this act they only worked eight hours a day. It was to meet this case that the section, to which you have called my attention, was enacted; and that provides: "That the proper accounting officers be, and hereby are, authorized and required, in the settlement of all accounts for the service of laborers, workmen, and mechanics employed

by or on behalf of the Government of the United States, between the twenty-fifth day of June, eighteen hundred and sixty-eight, the date of the act constituting eight hours a day's work for all such laborers, workmen, and mechanics, and the nineteenth day of May, eighteen hundred and sixty-nine, the date of the proclamation of the President concerning such pay, to settle and pay the same, without reduction on account of reduction of hours of labor by said act, when it shall be made to appear that such was the sole cause of the reduction of wages, and a sufficient sum for said purpose is hereby appropriated out of any money in the Treasury not otherwise appropriated."

I am strongly inclined to the opinion, considering the history of Congressional legislation upon this subject, and particularly in view of the recent decision of the Supreme Court in the "Twenty per cent. cases," (13 Wallace, 568,) that this statute is to have a broad and liberal construction; and that the above case is decisive against limiting its provisions to those who would fall in strict language within the terms "laborers, workmen, and mechanics." On the contrary, I think it was the intention of Congress to include within the provisions of this act, and of the previous act of 1868, all persons who are employed and paid by the day. It clearly does not extend to persons who are paid regular salaries, but is limited to employes who are paid a day's wages for a day's work; and its purpose was to fix the number of hours which thereafter was to be considered as a day's work and entitling the workmen to a day's wages.

If there is in the employment of the Government any class of persons so employed and paid, I think they are entitled to the benefit of this act, although in common parlance they might not come within the strict definition of laborers, workmen, and mechanics.

I have the honor to be, sir, your very obedient servant,

CLEMENT HUGH HILL,

Acting Attorney-General.

Hon. WM. W. BELKNAP,

Secretary of War.

[Indorsement on letter referred by the Secretary of the Treasury to the Second Comptroller.]

Respectfully returned to the Secretary of the Treasury.

The decision of this Office in the premises was founded on the presumption that when Congress said "laborers, workmen, and mechanics" they meant what they said. I see no sufficient reason to change my opinion on the subject. Neither the act of June 25, 1868, or May 18, 1872, nor the proclamation of the President of May 19, 1869, make eight hours a day's work for any persons in the service of the United States except "laborers, workmen, and mechanics." I do not see how the accounting officers, or anybody else, can add to the list without usurping the functions of legislation. The Acting Attorney-General, in an opinion of the 9th instant, thinks that Congress *intended* to include other persons in the acts of 1868 and 1872. If so, what they meant they did not say, and who shall prescribe the limits. A clerk is no more a "laborer, workman, or mechanic" than the Secretary of the Treasury is, and I am not aware that the opinion was required to solve any doubts entertained by the accounting officers, or that it was given for their government, though its eminent professional source entitles it to great respect.

J. M. BRODHEAD,

Comptroller.

SECOND COMPTROLLER'S OFFICE, *November 22, 1872.*

10 DEC, VOL '5

EIGHT-HOUR LAW.

The following is the letter of the First Comptroller to the Secretary of War:

TREASURY DEPARTMENT,
FIRST COMPTROLLER'S OFFICE,
Washington D. C., December 5, 1872.

SIR: During the past summer a list of persons employed at the Watertown arsenal, and claiming payment under the provisions of the acts of June 25, 1868, and May 18, 1872, was submitted to the Second Comptroller for his decision upon the question whether they were embraced in those provisions. As the same question would come to this office from other branches of the public service, that officer consulted the First Comptroller, and both concurred in the decision that "superintendents, clerks, and policemen" were not within the provisions of the laws in question; and, in accordance with that decision, the superintendent of the arsenal was advised by the Second Comptroller that the classes of persons just named were not entitled to the additional compensation allowed by the act of May 18, 1872.

The same question was again presented to the Second Comptroller, and, after consultation with this office, the Acting Second Comptroller decided as before.

Under date of September 24, 1872, one of the clerks at the arsenal addressed the President on the subject. That communication, with the decision of the Second Comptroller, was referred by you to this office, with the request that the Comptroller would communicate to the War Department his views of the application of the act of Congress of May 18, 1872, to the classes of claimants enumerated in the papers. My views were communicated to the War Department in my letter of October 21, 1872, in which I said:

"The intention of Congress, beyond question, was to reward those engaged in labor requiring physical exertion as distinguished from employments requiring mental culture.

"My conclusion, therefore, is that the terms 'laborers, workmen, and mechanics,' as used in the acts of Congress, are to be taken, according to their common acceptation, as embracing only those who are engaged in physical employments, and as excluding all others."

I also stated my opinion that the fact of employment by the day was of no importance in deciding the question presented, and intimated pretty clearly that the character of the service rather than the period of its duration under the contract, whether for a day, a month, or a year, must govern the decision.

Thus, upon the first question, the concurrent decisions of the First and Second Comptrollers, which had been given upon proper submission of it to them, were communicated to the War Department, as was also the decision of the First Comptroller upon the second question, which was necessarily involved by the manner in which the clerks at the arsenal had presented and urged their claim. On both points the First and Second Comptrollers agree, although I am not aware that the latter officer has recorded his opinion upon the second point.*

I now learn from a printed copy of "General Orders, No. 93," issued by the Adjutant-General, November 2, 1872, that subsequently to the making of the decisions by the Comptrollers to which I have referred.

* The Second Comptroller had accorded his decision November 20, 1872.

amination before a judge or commissioner, of a person charged with crime, ten cents a mile for going, and ten cents a mile for returning.

When an indictment for crime is tried before a jury and a conviction is had, the district attorney may be allowed, in addition to the attorney's fees herein provided, a counsel fee, in proportion to the importance and difficulty of the cause, not exceeding thirty dollars.

* * * * *

"Sec. 838. It shall be [the] duty of every district attorney to whom any collector of customs, or of internal revenue, shall report, according to law, any case in which any fine, penalty, or forfeiture has been incurred in the district of such attorney for the violation of any law of the United States relating to the revenue, to cause the proper proceedings to be commenced and prosecuted without delay, for the fines, penalties, and forfeitures in such case provided, unless, upon inquiry and examination, he shall decide that such proceedings cannot probably be sustained, or that the ends of public justice do not require that such proceedings should be instituted; in which case he shall report the facts in customs cases to the Secretary of the Treasury, and in internal-revenue cases to the Commissioner of Internal Revenue for their direction. * And for the expenses incurred and services rendered in all such cases, the district attorney shall receive and be paid from the Treasury such sum as the Secretary of the Treasury shall deem just and reasonable, upon the certificate of the judge before whom such cases are tried or disposed of * * *."

In Connolly's case (4 Lawrence, Compt. Dec., 45) it was said:—

"An allowance may be made under section 838 of the Revised Statutes in favor of an United States District Attorney, for 'inquiry and examination,' to determine whether cases reported to him by collectors of internal revenue for violations of the internal-revenue laws shall be prosecuted in court, in those cases in which the attorney, after the requisite examination, reports the facts to the Commissioner of Internal Revenue, although no proceedings in court are instituted."

That case itself did not involve the question thus stated therein, and, hence, such question cannot be said to have been *decided*. The principle so stated in that case was discussed upon what was understood to be the usage which had prevailed. But whatever may be the true construction of section 838 of the Revised Statutes,* it is clear, that a claim under it cannot be allowed by the accounting officers, unless such claim has first been approved by the Secretary of the Treasury "upon the certificate" of the proper judge; because this section expressly says, as to the cases to which it applies, that:—

"For the expenses incurred and services rendered in all such cases, the district attorney shall receive and be paid from the Treasury such sum as the Secretary of the Treasury shall deem just and reasonable, upon the certificate of the judge before whom such cases are tried or disposed of."

* If the question of the proper construction of section 838 were *res integra*, there would be much of authority to support the view, that the compensation of district attorneys in the cases, to which said section applies, is to be fixed *exclusively* in the mode therein stated; and that no compensation in such cases can be paid under section 824. The latter section prescribes fees for the trial of cases generally, section 838 prescribes the mode of fixing the fees to be paid for all services in a separate and particular class of cases; and it may well be urged, that these latter cases are excepted from the operation of section 824 (Huidekoper's case (second), 3 Lawrence, Compt. Dec., 160, and cases there cited).

statute. This constitutes the difference between a strict and a liberal construction.

Words used in a statute are to be taken in their natural and ordinary signification and import, if of common use; and the occasion which induced its passage may also be referred to to ascertain the intent of the legislature.

The words used in the act of Congress are "laborers, workmen, and mechanics." That these words, in their natural and ordinary signification and import, embrace only persons engaged in physical employments is unquestionable; and that Congress used them in this sense I cannot doubt, and the whole history of this legislation, as well as the facts leading to it, proves the correctness of this conclusion.

For a long time there has existed a conflict between "capital and labor"; or, to speak more accurately, between "capitalists and laborers," frequently taking the form of conference and adjustment, and sometimes of actual collision or demonstrations toward it. "Unions" of "laborers, workmen, and mechanics" have been formed, having reference to the hours of labor and its compensation, but always and exclusively in the interests of physical labor. Laws were enacted in some States and countries prohibiting the employment of children under a certain age in factories, and limiting and grading the hours of labor of minors above such age, and in some instances prohibiting such employment at night. "Labor-reform associations" have been formed more general in their objects than the "unions," which were usually limited in their composition to persons of some particular trade or employment, while the "labor-reform associations" embrace within their purposes the interests of all classes of persons engaged in physical employments, and are composed of such persons. These associations have also the purpose of using political influences and action to gain their objects. There are also organizations called "working-men's associations" and there are probably others; but all have the same objects in view—the improvement of the condition and advancement in the compensation of those whose muscles constitute their chief capital. I am not aware that "superintendents, clerks, or policemen" belong to these associations or promote their objects. The history of the eight-hour law, and that of May 18, 1872, shows that they were procured to be passed through the influence and for the benefit of the laborers, workmen, and mechanics composing and represented by the various associations to which I have alluded.

In the sense in which superintendents, &c., "work" or "labor," every person in the legislative, executive, and judicial branches of the Government "work" and "labor," and yet no one of them is within the terms used in the acts, and probably no one of them would be willing to be thus named, except such of them as have physical employments.

I do not understand upon what authority the Acting Attorney-General announces as his opinion that it was the intention of Congress to include within the provisions of these laws "all persons who are employed and paid by the day;" nor do I find any warrant in the laws for his opinion that they are "limited to employes who are paid a day's wages for a day's work."

The act of 1868 simply provides "that eight hours shall constitute a day's work for all laborers, workmen, and mechanics now employed, or who may hereafter be employed, by or on behalf of the Government of the United States," and nothing more.

It makes no reference whatever to the length of the employment or the time or manner of payment. And why should such a distinction be

made? What imaginable difference ought the law to make in the hours of labor between the man who works by the day for two dollars and him who works by the week at twelve dollars? Holding, as he does, that the law includes only those who are employed and paid by the day, the Acting Attorney-General must also hold that the laborer by the week may be required, as before, to work ten hours for a day, and receive the same wages and no more for ten hours than the day-laborer does for eight. The construction would also, if correct, enable the employing officer to evade the manifest intention of Congress by changing the employment from daily to weekly, and thus to defeat wholly the just and liberal intention of the legislature. The opinion on this point is the reverse of broad and liberal in its construction of the law, and is illogical. Under it the benefit of the law may be given or denied at the pleasure or caprice of the employing officer, and men working side by side may have different rates of payment and of hours of labor prescribed for them.

I address this letter to you because of our former correspondence on the subject, and it is written to vindicate the lawful powers of my office.

I have the honor to be, very respectfully, your obedient servant,
R. W. TAYLER,
Comptroller.

Hon. W. W. BELKNAP,
Secretary of War.

IN THE MATTER OF THE PROPER MODE OF PAYING THE SALARY OF
THE PRESIDENT OF THE UNITED STATES.—PRESIDENT'S CASE.

1. The usage as to the mode of paying the President's salary, and settling his accounts thereof stated.
2. The proper mode stated.

The Revised Statutes provide that, "The President shall receive in full for his services during the term for which he shall have been elected the sum of fifty thousand dollars a year, to be paid monthly." (Rev. Stat., 153.)

There are two modes in which this salary may be lawfully paid. These are described in Senate-disbursement case (2 Lawrence, Compt., Dec., 2d ed., 404), and in Otto's case (3 *Id.*, 302).

1. The First Auditor may, on request of the President, or, in fact, of his own authority, state an account at the end of each month for the amount due the President, and make report thereof to the First Comptroller, who may then certify a balance due to the President, on which the Secretary of the Treasury may grant a warrant on the Treasurer of the United States in favor of the President to pay him the sum due, which warrant is to be countersigned by the First Comptroller and entered in his office and in that of the Register of the Treasury. The

Treasurer may, on this authority, make payment either in money or by draft on the Treasurer or an assistant treasurer or depository (Rev. Stat., 236, 248, 269, 277, 305, 313; 1 Lawrence, Compt., Dec., 2d ed., App. 424, 438).

2. Instead of this mode it is lawful for the Treasurer of the United States, as a disbursing officer, to make requisitions from time to time on the Secretary of the Treasury for an advance of money from the proper appropriation to pay the salary of the President. The requisitions are to be approved by the First Comptroller, and then the Secretary may issue an "accountable warrant" to be countersigned by the First Comptroller. This warrant authorizes money to be carried to the credit of the Treasurer, as disbursing officer, to be accounted for by him, and proper entries are made in the Register's office. The Treasurer, as disbursing officer, from the money so placed at his disposal, may properly pay the President in money or by draft, taking a proper voucher for such payment. The account of the Treasurer for the disbursement of the money is to be settled by the First Auditor, and finally revised by the First Comptroller (Rev. Stat., 236, 269, 277, 313, 3620, 3639, 3648; 1 Lawrence, Compt., Dec., 2d ed., App. 423).

As a matter of fact, neither of these modes of payment has been adopted in the practice which has prevailed for a long time. Under this practice, which is really without authority of law (unless long usage has made it lawful), but which has never resulted in any loss to the Government, one of the Assistant Secretaries of the Treasury, by a written order, which is, perhaps improperly, called a requisition, directs the chief of the division of warrants in the Secretary's office to cause an *accountable warrant* on the Treasurer of the United States to be issued in favor of the President by name for a sum specified, being a month's salary, and, as the order says, "with which he, the President, is to be charged and held accountable" under the proper appropriation for President's salary. Upon this an accountable warrant is granted by the Secretary of the Treasury countersigned by the First Comptroller, requiring the Treasurer of the United States to pay said sum to the President by name to be charged to said appropriation, and for which he, the President, "is to be charged and held accountable." This is registered in the office of the First Comptroller and Register of the Treasury, and goes to the Treasurer as his authority to pay a month's salary, which he accordingly does. Then at the close of the President's term, the First Auditor states an account between the United States and the President, charging him with all money so paid to him, and giving him credit for the several installments of monthly salary due to him. These, of course, balance. The account is by the First Auditor transmitted, with a report, to the First Comptroller, who certifies the account, which is thus closed, and proper entries are made in the records. This is anomalous, but it has the sanction of usage. But no usage, however long continued, which is against a plain statute can be lawful (Broom, Leg. Max., 7th ed., 685; *Pochin v. Dun-*

combe, 1 H. & N., 857; The Ferinoy Peerage case, 5 House Lords Cas., 716; Gwyn *v.* Hardwicke, 1 H. & N., 53; Gorham *v.* Bishop of Exeter, 15 Q. B. 74, 69 E. C. L. R.). The present mode of making payment just described is not in accordance with the statute. It is in violation of section 3648 of the Revised Statutes, which prohibits the "advance of public money," except as it may be authorized by the President to disbursing officers or agents, and to persons in the military and naval service employed on distant stations. The President is not and cannot be a disbursing officer. The duties imposed upon him, and powers given to him, by the Constitution are utterly inconsistent with the idea that he can hold any office subordinate to himself, or exercise any government agency subject to his own control. The office of President is incompatible with such agency or office (Bender's case (second), 1 Lawrence, Compt., Dec., 2d ed., 402). An accountable warrant treats the President as a disbursing agent without appointment or bond as such (Rev. Stat., 3614), and, in effect, requires him to answer to accounting officers for the money so received. It is evident he can be subjected to no such accountability or jurisdiction.

The regular and convenient mode is for the First Auditor to state an account monthly and make report thereof to the First Comptroller, who can then certify a balance to be paid by warrant. But it may be more convenient that a change should be made at the commencement of a Presidential term. The present practice may be continued until March 4, 1885, when the regular mode should be commenced.*

TREASURY DEPARTMENT,

First Comptroller's Office, February 28, 1884.

* The following copy of requisition and accountable warrant will show the existing practice.

Office of the Secretary of the Treasury,
Division of Warrants, Estimates, and Appropriations.
Form No. 105.

Wt. No. 2262.
TREASURY DEPARTMENT,
WASHINGTON, D. C.,
August 25, 1882.

Mr. WM. F. MACLENNAN,
Chief of Division of Warrants, &c.:

SIR: Please cause a Warrant to be issued in favor of Chester A. Arthur, President of the United States, for the sum of four thousand one hundred and sixty-six dollars and sixty-seven cents, with which he is to be charged and held accountable, under the following head of appropriation.

Very respectfully,

JNO. C. NEW,
Assistant Secretary.

APPROPRIATION:			
'Salary of the President' ———, 1883.....	\$4	166	07
Salary for the month of August, 1882.			

Office of the Secretary of the Treasury,
Division of Warrants, Estimates, and Appropriations.
Form 18.

TREASURY

Accountable
Warrant.

No. 2262.

\$4,166. 67.

APPROPRIATIONS.

1882. Salary of the President,	\$4	166	67
(Stamp.)			
Treasurer's Office,			
Aug. 26, 2 p. m.,			
Division of Accounts.			

TREASURY DEPARTMENT.

To the Treasurer of the United States
greeting:

Pay to Chester A. Arthur, President U. S., or order, to be charged to the appropriations named in the margin, four thousand one hundred and sixty-six dollars and sixty-seven cents. On account of his salary for August, 1882, and for which he — is to be charged and held accountable. For so doing this shall be your WARRANT.

GIVEN under my hand and the seal of the Treasury Department this 25th day of August, in the year of our Lord one thousand eight hundred and eighty-two, and of Independence the one hundred and seventh.

H. F. FRENCH,
Assistant Secretary.

Countersigned:

WM. LAWRENCE,
First Comptroller.

Registered:

B. K. BRUCE,
Register.

OFFICE OF THE
TREASURER OF THE UNITED
STATES.

Received for this Warrant the
following draft: No. 18112, on
New York, No. — on —
Mailed Aug. 30, 1882. M.

IN THE MATTER OF THE RIGHT TO DRAWBACK UNDER THE ACT OF MARCH 3, 1883 (22 STAT., 433), ON GOODS LADEN ON A VESSEL FOR EXPORT PRIOR TO JULY 1, 1883, WHEN THE VESSEL CLEARED AT A LATER DATE.—LAZARUS & CO.'S CASE.

1. Under the act of March 3, 1883 (22 Stat., 433), goods are not "exported" until the vessel in which they are laden has "cleared" from the port from which the export is made.

The act of March 3, 1883 (22 Stat., 433), provides "that no drawback shall be allowed upon articles" of a specified class "that shall be *exported* on and after the first day of July, 1883."

In June, 1883, A. S. Lazarus & Co., of New York City, placed on board a ship for export certain medicinal preparations of the specified class. June 28, 1883, the goods were inspected, and the inspector certified that they were then laden on board the vessel. Prior to the 30th of June, the exporters had a bill of lading signed for the goods by the captain of the vessel, which bill was then lodged with the collector of customs at New York.

August 7, 1883, the collector of customs certified that the vessel cleared from the port on July 31, 1883, with the goods duly laden, and "that a proper bill of lading covering above named merchandise has been filed in this [his] office," but it is not shown when it was so filed.

The First Comptroller is required to decide whether the exporters are entitled to drawback.

DECISION BY WILLIAM LAWRENCE, *First Comptroller*.

If the goods in question were "exported" within the meaning of the act of March 3, 1883, when they were *laden on the vessel for export*, the claimants are entitled to drawback. If the goods were not exported until the vessel "*cleared*," then the claimants are not entitled to drawback. The usage has been as to such goods to regard them as "*exported*" only at the date of the *clearance* of the vessel. This question becomes important, as *in principle* it affects the claims for drawback on foreign goods imported and subsequently exported.

In the Treasury Department Regulations of 1874, under the Customs and Navigation Laws, one provision (page 202) is as follows:

"ART. 433. The '*time of exportation*' must be deemed and taken to be the date at which the merchandise *actually leaves the foreign port* for its destination in the United States, which period may ordinarily be established by the production of the *clearance* granted to the vessel at the foreign port and the declaration of the master, under oath, at the time of entry, of the date when the vessel sailed."

Any other rule would be unsafe and impracticable. Until a vessel *clears*, goods may be withdrawn from it, and thus the operation of the revenue laws might be evaded.

The goods in this case were "exported" July 31, 1883, when the vessel "*cleared*," and not prior thereto.

The claimants are not entitled to drawback.

TREASURY DEPARTMENT,

First Comptroller's Office, April 17, 1884.

IN THE MATTER OF THE AUTHORITY OF THE COMMISSIONERS OF THE DISTRICT OF COLUMBIA TO PAY TO A SALARIED CLERK IN AN EXECUTIVE DEPARTMENT OF THE UNITED STATES, COMPENSATION FOR EXPERT SERVICES RENDERED FOR SAID COMMISSIONERS.—EXTRA COMPENSATION CASE.

1. Section 1765 of the Revised Statutes prohibits a salaried clerk in an executive Department of the United States, from receiving additional compensation for any service rendered for the Commissioners of the District of Columbia.
2. The expenses of "engrossing a letter to the mayor of Buenos Ayres, acknowledging the receipt of a gold medal presented to the city of Washington," cannot be paid from the appropriation made for contingent expenses of the executive office of the District of Columbia by the act of July 1, 1882 (22 Stat., 137), unless such service was necessary or proper to conduct the appropriate business of said office, or of the government of the District of Columbia, and was not otherwise provided for.

May 29, 1883, the Commissioners of the District of Columbia paid "for engrossing a letter to the mayor of Buenos Ayres, acknowledging the receipt of a gold medal presented to the city of Washington," the sum of \$25 from the appropriation made by act of July 1, 1882 (22 Stat., 137), for contingent expenses of the executive office of the District of Columbia, to a person who, at the time of rendering such service, was receiving salary at the rate of \$1,400 a year, as a clerk in the Interior Department. The First Comptroller is required to decide whether (1) such clerk could lawfully receive payment for such service, and (2) whether any such payment is a proper charge on said appropriation.

DECISION BY WILLIAM LAWRENCE, *First Comptroller*.

It is provided by section 1765 of the Revised Statutes as follows:

"No officer in any branch of the public service, or any other person whose salary, pay, or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation."

The claimant at the time the service was rendered was, and yet is, an "officer in [a] branch of the public service whose salary [was] fixed

by law," and so could not lawfully receive the "additional pay or compensation" in question. The purpose of the statute was to prohibit officers and persons receiving fixed salary or compensation under the authority of the United States from receiving "any additional pay extra allowance, or compensation, in any form whatever, for any other service or duty whatever," rendered under the authority of an act of Congress, and to be paid for from public revenues collected under similar authority. It was designed to prevent *one person* from securing more than one fixed compensation for any public service rendered under the authority of the National Government, and payable from its revenues or from any other source, including private persons, as compensation authorized by public authority. It was designed to *distribute* the real or supposed favors of public emoluments, so that they should not be duplicated for the benefit of any one person already in the receipt of a salary fixed by law, which in legal contemplation is a full recompense for all public services. The District of Columbia is under the exclusive legislative control of Congress (Const., Art. 1, Sec. 8, Clause 17). This includes the power of taxation (*Loughborough v. Blake*, 5 Wheat., 317). It carries with it the right of exclusive jurisdiction (*United States v. Cornell*, 2 Mason, C. C. 60, 91; 6 Op. Att.-Gen., 577; 9 Op. Att.-Gen., 521; *Cohens v. Virginia*, 6 Wheat., 264; Story, Const., 1229, 1234; Paschal, Anno. Const., 3d ed., 137, *notes* 136, 137). There is no other place in the United States in which Congress has such complete, absolute, original, unrestrained authority as in this District. All revenues are raised by direct authority of Congress (Act of June 11, 1878, 20 Stat., 104).

Every officer exercising local functions in the District holds "office under the General Government" (*Cox's case*, 14 Court Cl., 514). Their salaries are "paid by the Government at the Treasury of the United States."

2d. The entire revenues raised in the District are paid into and disbursed from the Treasury of the United States by officers of the United States (Act June 11, 1878—20 Stat. 105). The whole local government is a part of the General Government (*Rheem's case*, 3 Lawrence, Compt. Dec., 307). It is a "branch of the public service." One-half of all expenditures are paid by the United States from its general customs receipts, internal revenues, and other sources of revenue. The Government is thus directly interested in enforcing the prohibition against paying extra compensation to its officers. Every reason which extends the prohibition against officers generally of the United States receiving from extra compensation for extra services rendered to the United States applies against the payment in this case. The claimant is an officer of the United States. The extra services rendered, if they could have been lawfully performed by and paid for to any person, were performed under the authority of the United States, and for a "branch" of "its public service." If the entire District service is not a "public service," what is it? It is not a private service. The service of a mu-

municipal government is a public service (*Barnes v. District of Columbia*, 91 U. S., 540). Section 1765 of the Revised Statutes is sufficiently explicit to defeat the claim for extra compensation. Section three of the act of June 20, 1874 (18 Stat., 109), is equally explicit. It provides "that no civil officer of the Government shall hereafter receive any compensation or perquisites, directly or indirectly, from the Treasury or property of the United States, beyond his salary or compensation allowed by law" This claim was paid "directly from the Treasury of the United States" (Rev. Stat., 3620).

It may be somewhat difficult to perceive how the services in question can be regarded as a proper charge upon the appropriation for contingent or miscellaneous expenses of the Executive Office of the District. No law has in any specific terms charged the Executive Office with receiving gold medals from foreign cities or governments. If such duty exist, it must be one incidental to some specific power given by law to the Executive Office, or of the District Government in some form. This Office, or the District Government, may fairly be supposed to have the usual powers of municipal governments, within the limits of the laws of its creation, and the appropriations made for its support. Some forms of comity, and even courtesy, to other city governments, must within proper limits be recognized, and especially from the enlightened capital of the most powerful republic in existence.

The District officers, either as such or personally, cannot, without the consent of Congress, "accept of any present, emolument, office, or title, of any kind whatever, from any king, prince or foreign state" (Const. Art. 1, sec. 9, clause 8). If the executive officers of the District can accept a gift of pecuniary value, it must be by virtue of the act creating the District Government. This creates a municipal corporation, and it may be assumed that one of its inherent powers is to acquire property, and thus to accept the gold medal to which the service in question refers (*McDonough Will Case*, 15 How., 367, 403; 2 *Dillon, Municipal Corp.*, 3d ed., § 556 [427]; 1 *Id.*, 476 [397]).

The act of July 1, 1882, provides for the District executive office all the ordinary clerical service which it could lawfully have. (22 Stat., 137.) The only ground upon which the services now in question could have been lawfully procured, as a charge upon the contingent fund, is, that they were necessary or proper to conduct the appropriate business of the executive office, and were not otherwise provided for (*Decoration Case*, 2 *Lawrence, Compt. Dec.*, 2d ed., 73).

The evidence does not sufficiently disclose the character and purpose of the gold medal received by the District Commissioners, to determine this question. And as payment could not lawfully be made to the claimant, it becomes unnecessary to pursue the enquiry.

The voucher is disallowed in settling the accounts of the Commissioners.

TREASURY DEPARTMENT,

First Comptroller's Office, April 15, 1884.

IN THE MATTER OF THE PAYMENT OF THE "SURPLUS PROCEEDS" OF A TAX-SALE OF REALTY UNDER THE DIRECT TAX-ACTS OF AUGUST 5, 1861 (12 STAT., 304), JUNE 7, 1862 (*Id.*, 422), AND JUNE 8, 1872 (17 STAT., 332).—PUTNAM CASE.

1. Congress has constitutional authority to prescribe prospectively a course of distribution of the money which a resident of any State may at the time of his decease be entitled to receive from the Government under a law of the United States.
2. Upon the same principle Congress may prescribe the party to whom payment of "the surplus of the proceeds" of a sale under the direct tax-acts of August 5, 1861 (12 Stat., 304), and June 7, 1862 (*Id.*, 422), shall be made in case of the decease of the claimant originally entitled to such payment.
3. The surplus proceeds of such sale, when deposited in the Treasury, are held as a trust-fund for the claimant authorized by the direct-tax acts to receive it.
4. The expression, "legal representatives," in section 36 of the direct tax-act of August 5, 1861 (12 Stat., 304), means the executor or administrator of a decedent.
5. A claimant for the surplus proceeds of a direct tax-sale is required to show that they have been "deposited in the Treasury."
6. The evidence of such deposit is not furnished by the legal presumption, that the officers, who received the money, and were by law charged with the duty of depositing it in the Treasury, performed their duties.
7. When the estate of a decedent has been settled in the proper probate court by a settlement final in form, the law of the domicile of such decedent will determine whether subsequently discovered assets are to be administered by the prior executor or administrator, or by a newly appointed administrator.

December 21, 1863, Commissioners under the direct-tax act of June 7, 1862 (12 Stat., 422), sold at a tax-sale, lots in Saint Augustine, Florida, of which Benjamin A. Putnam was legal owner, as follow: Lot 73, Block 46, to C. L. Robinson for \$1,100; Lot 53, Block 36, to S. M. Porter for \$2,200; and Lot 3, Block 3, to R. A. Fowler for \$45. The surplus proceeds of said tax-sale, amounting to \$3,214.50, after satisfying the tax, costs, charges, and commissions, were deposited in the Treasury. Putnam, by his last will dated January 30, 1867, bequeathed all his estate to his wife and appointed her his executrix, and died January 25, 1869. The will was duly admitted to probate; and the wife qualified as executrix, and made final settlement of the estate in the proper court, by which she was discharged. She died testate October 17, 1877, and, by her will duly proved, appointed an executor, directed the payment of certain specific legacies, and devised the residue of her estate to her grandsons, John Caldwell Calhoun, Benjamin A. P. Calhoun, and William Lowndes Calhoun. This estate has been duly settled, the legacies have been paid, and the executor has been discharged.

November 21, 1883, said grandsons applied to the Treasury Department for the payment of said sum of \$3,214.50, the surplus proceeds of the tax-sale. These claimants have executed to each of the purchasers

at the tax-sale, releases of all claims to the lots by them respectively purchased.

January 18, 1884, the Commissioner of Internal Revenue by letter, transmitted the papers in this case to the Secretary of the Treasury, with a recommendation, that the claim be approved for \$3,214.50, and paid to the claimants. January 21, 1884, this letter, with the papers, was, by the Secretary referred to the Fifth Auditor for examination and report. The Fifth Auditor stated an account in favor of the claimants, and transmitted it, with his report, to the First Comptroller for his action thereon.

E. R. McKean for the heirs:

"The words, 'legal representatives', include the heirs-at-law (*Hogan v. Page*, 2 Wall., 605; *Carpenter v. Rannels*, 19 *Id.*, 138, 145; *Amos v. Campbell*, 9 Fla., 187; *Magee et als. v. Doe, ex dem.* (*Id.*, 382; *McClellan. Digest Laws Florida*, ch. 92, secs. 1 and 2; *Id.*, ch. 2, secs. 5-7). The estate of Benjamin A. Putnam having been finally settled, after full administration, not including this claim, payment should be made to the heirs."*

DECISION BY WILLIAM LAWRENCE, *First Comptroller.*

The claim in this case is made under section 36 of the direct-tax act of August 5, 1861 (12 Stat., 304), which, after authorizing a sale of real estate in case of the non-payment of direct taxes assessed according to law, provides that:

"The surplus of the proceeds of the sale, after satisfying the tax costs, charges, and commissions, shall be paid to the *owner* of the property, or *his legal representatives*, or if he or they cannot be found, or refuse to receive the same, then such surplus shall be deposited in the Treasury of the United States, to be there held for the use of the owner or his legal representatives, until he or they shall make application therefor to the Secretary of the Treasury, who, upon such application, shall, by warrant on the Treasury, cause the same to be paid to the applicant."

And see act of March 3, 1883 (22 Stat., 595).

The sum claimed, \$3,214.50, is "the surplus of the proceeds" of the tax-sale, as above stated, "after satisfying the tax, costs, charges, and commissions." This sum, the statute declares, "shall be paid to the

* This is not a case, in which an application is made to redeem land sold at a tax sale. The act of June 8, 1872 (17 Stat., 330, sec. 1), authorized the original owner, his heirs or devisees, to redeem any tract of land in an insurrectionary district, purchased at a direct tax-sale by the United States. This act in no way indicates that the words "legal representatives," in section 36 of the act of August 5, 1861 (12 Stat., 304), mean heirs or devisees. An act passed in 1872 can furnish but slight evidence of what Congress intended in an act passed in 1861: and section 36 of the act of August 5, 1861, has a very different purpose from that of section 1 of the act of June 8, 1872. The former section relates to a money-demand, a chattel-interest, or a chose in action, which, by all usage, goes to the executor or administrator of a deceased claimant: while the latter relates to redeeming the land, which, by universal law, goes to the heir-at-law or devisee of a deceased owner. See *United States v. Taylor* (104 U. S. 220), and *United States v. Lawton* (110 U. S., 146).

[original] owner of the property, or his legal representatives." The original owner is dead; and if this statute is *valid*, payment must be made to "his legal representatives." The sole questions, therefore, to be determined are, (1) whether the provision of the statute requiring payment to be made to the "legal representatives" is valid, and (2) *who* are the "legal representatives." These questions will be considered in the order stated.

As a question of constitutional law, Congress has undoubted authority to prescribe prospectively a *course of distribution*—even contrary to that under a State law—of the money which a resident of such State may at the time of his decease be entitled to receive from the Government under a law of the United States. This is settled by long usage. Many examples may be given of statutes of this character. Thus, the Joint Resolution of March 3, 1859 (11 Stat., 442), as carried into section 49 of the Revised Statutes, provides that:

"When any person who has been elected a member of or delegate in Congress dies after the commencement of the Congress to which he has been elected, his salary shall be computed and paid to his widow, or, if no widow survive him, to his heirs at law, for the period that has elapsed from the commencement of such Congress, or from the last payment received by him to the time of his death," &c.

And the act of June 19, 1840 (5 Stat., 385), provides that, "in case any male pensioner shall die, leaving children, but no widow, the amount of pension due to such pensioner at the time of his death * * * shall not be considered as a part of the assets of said estate, nor liable to be applied to the payment of the debts of said estate, but shall be distributed among the children of the decedent in equal shares." The Supreme Court said of this act, that:

"There can be no doubt that Congress had a right to distribute this bounty at their pleasure, and to declare that it should not be liable to the debts of the beneficiaries." (*Walton et al. v. Cotton et al.*, 19 How., 358.)

The same principle is elsewhere affirmed (*Heirs of Emerson v. Hall*, 13 Pet., 413; *United States v. Hall*, 98 U. S., 343; *Allspach's case*, 2 Lawrence, Compt. Dec., 2d ed., 260; *Keyser's case*, 4 Lawrence, Compt. Dec., 287; *Garnet's case*, 3 *Id.*, 270). The authority to enact statutes of the character mentioned is found in that clause of the Constitution, which vests in Congress "All legislative Powers" therein granted (Const. U. S., Art. I, Sec. 1). One of the legislative powers therein granted is, "To make all Laws which shall be necessary and proper for carrying into Execution" all the specific powers given to Congress, including those to collect taxes, to pay the debts of the United States, and generally to carry on all the operations of a perfectly independent government (*Id.*, Sec. 8, Par. 18). The authority of Congress to create a liability against the United States necessarily includes the power to provide to whom payment shall be made in case of the death of an original claimant.

The statutes so far referred to are those only in which the liability created was in the nature of a *debt*, or a *gratuity*. The surplus proceeds of a direct tax-sale, *when deposited in the Treasury*, are held as a *trust-fund* for the rightful claimant (Act August 5, 1861—12 Stat., 304, sec. 36; *United States v. Ross*, 92 U. S., 282; *United States v. Taylor*, 104 U. S., 222; *United States v. Lawton*, 110 U. S., 149). In executing the act of Congress which authorized tax-sales, the trust-fund is created. Congress had power to authorize tax-sales, and to create the trust-fund, and, as incident thereto, the authority to determine to whom payment should be made in case of the death of an original claimant. The act of Congress might have left to each State the power to prescribe to whom payment should be made in such cases; but it did not do so. The act of August 5, 1861 (12 Stat., 304, sec. 36), declares that payment, in all such cases, shall be made to the "legal representatives" of the original legal-owner. The authority to so declare is as complete for all purposes of administering the trust as it is to make similar provision in relation to the payment of the debts or gratuities of the United States. This is not a statute of *distribution*, but only determines the party to whom payment shall be made.

The question now arises, who are the "legal representatives" of the original owner in case of his death? They must generally be (1) his heirs at law, (2) his devisees, (3) the persons declared to be such "legal representatives" by the law of the State in which he had his last domicile, or (4) his executors or administrators. Of course, there may be assignments by operation of law; but it is not necessary now to consider these. It is entirely clear from a multitude of authorities,* that the expression, "legal representatives," in its technical and legal sense, means and includes only the executors or administrators of a decedent. It is also well settled, that words or expressions in a statute, "which have acquired a particular legal meaning, are, in the absence of circumstances otherwise controlling them, given this meaning in the interpretation" (Bishop, *Written Laws*, 96, 100; *Potter's Dwarrris*, Stat. 274; *Hardcastle*, *Statutory Law*, 80; *Sedgwick*, *Construction Stat. and Const. L.*, 2d ed., 221). The rule is well stated in *Ex parte Vincent* (26 Ala., 153), that:

"When words are used by the Legislature in relation to a matter or subject, which, when used in reference to the same subject at the common law, have obtained a fixed and definite meaning, the inference, * * * is irresistible, that they were intended to be used in their common law sense."

It is thus evident, that the expression, "legal representatives," in section 36 of the direct tax act of August 5, 1861 (12 Stat., 304), means the executor or administrator of a decedent. And it follows as a result, that this expression in said section cannot include heirs at law, dev-

* Some of these authorities are appended hereto in the foot-note at the end of this case.

isees, or those persons whom any State law may designate as legal representatives. The reasons in support of this conclusion seem to be irresistible.

The act of August 5, 1861 (12 Stat., 304, sec. 36), is *general in character*. And a learned author says, that—

“As a general statute speaks the language of the entire people, it cannot have a local meaning, or vary in particular places with the special usages there prevailing” (Bishop, *Written Laws*, 101; *Rex v. Hogg*, 1 T. R., 721, 728; *Dennick v. Railroad Co.*, 103 U. S., 11).

Congress deemed it proper to declare that payments should be made “to the owner of the property, or *his legal representatives*.” By a well-known rule of interpretation, it must be supposed that every word so used had a purpose; this must be ascertained; and effect must be given to all accordingly (Bishop, *Written Laws*, 82). The object of Congress evidently was, to *designate* beyond dispute the party entitled to payment in case of the death of the original owner. This is done by a general phrase having a well known signification of universal application. To hold that this shall vary with the laws of every State, in which it may be applied, is simply to hold that the act of August 5, 1861 (12 Stat., 304, sec. 36), is not a general statute, and that its purpose is to introduce various rules rather than one, and to give to the language used a force which it does not warrant. It may be said of the view which localizes the statute, and assigns to it different meanings changing with locality, that such view “is in direct contradiction of the words of the statute. The advocates of this view *interpolate* into the statute what is not there, by holding that” the “legal representatives” must be the persons designated as such by the laws of the State in which a deceased claimant had his last domicile (*Dennick v. Railroad Co.*, 103 U. S., 19). It has been said, that, when a statute is clear in its terms, it “must rest on the words used—‘nothing adding thereto, nothing diminishing’ * * *, ‘I see the necessity of not importing into statutes words which are not found there’” (*Leavenworth, etc., R. R. Co. v. United States*, 92 U. S., 751).

Some light is thrown on the meaning of the words “legal representatives” in section 36 of the act of August 5, 1861 (12 Stat., 304), by referring to the second *proviso* thereof, which declares:

“That the owners, *their heirs*, executors, or administrators, or any person on their behalf, shall have liberty to redeem the land and other property sold, as aforesaid, within two years from the time of sale, upon payment to the collector for the use of the purchaser, *his heirs or assigns*, of the amount paid by said purchaser,” &c.

The purpose of this provision evidently was to provide a means by which, in case of a tax-sale, the original *owner*, or *his heirs*, might reclaim the realty sold and be reinvested with the title; for which purpose such owner, his heirs, the proper executor or administrator, or any person on behalf of such owner or his heirs, might refund the amount paid by the purchaser. This redemption restored the land which would

appropriately vest in the *heirs at law*, if the original owner were dead. The money refunded is held "for the use of the [tax] purchaser, *his heirs or assigns*" (Allspach's case, 2 Lawrence, Compt. Dec., 2d ed., 260). This provision impressed on the money refunded the character of the land. But the prior provisions of this section of the statute, when dealing with the trust-fund in the Treasury, as to which a money demand against the United States might be preferred, gave the right to make such demand, not to the "heirs or assigns," but to the "legal representatives." The acts of May 9, 1872 (17 Stat., 89, Sec. 2), and June 8, 1872 (17 Stat., 332, sec. 9), provide, that, in all cases where the owner of any land sold for taxes, his heirs or assigns, by judicial process in a court of the United States, has recovered, or shall recover the same "from the purchaser, his heirs or assigns," payment shall be made "to the person or *persons entitled thereto* [of] a sum of money equal to that originally paid by the [tax] purchaser." The proper claimant for the purchase-money, in such case, is "the purchaser, his heirs or assigns," who may have been duly evicted; or, in case of the death of a party after eviction, and before receiving payment, the local law of his domicile will determine the "persons entitled thereto"; because the act of Congress does not specify the party in such case. It thus appears that whenever the statutes have secured rights to "heirs or assigns," they have been specifically named as such; and, hence, the words, "legal representatives," must mean "*executors and administrators*." These, as a *general* rule, are synonyms or equivalent expressions. See Tax-Sale-Surplus case (*ante*, 59). The Supreme Court seems to have recognized the correctness of this view. In *United States v. Taylor* (104 U. S., 216; s. c., 14 Ct. Cl., 339), the administrator of a deceased owner of realty recovered the surplus proceeds of a direct tax-sale thereof. It is true, no question was raised as to the proper claimant to sue: But the right of the administrator was recognized unchallenged. The case of *United States v. Lawton* (110 U. S., 146; s. c., 18 Ct. Cl., 603), does not establish any different rule. In that case, a party holding a remainder in fee was, after the decease of the equitable owner of a prior life estate, regarded as the "owner" entitled to payment of the surplus proceeds of a direct tax-sale.

The *argumentum ab inconvenienti* is entitled to some weight (Bishop, *Written Laws*, 82; *United States v. Fisher*, 2 Cranch, 358, 386). If accounting officers are required to make payments to devisees of the realty, out of which the claim for surplus proceeds arises, such officers will also be required to pass on difficult questions arising in the construction of wills, to deal with minors or their guardians, and with a multitude of persons scattered, it may be, in many States and even in foreign countries, and to trace the lineage of heirs at law of deceased devisees. It may be almost impossible in some cases for all such claimants to unite in one claim, and still more difficult to divide the amount in proper proportions to each claimant. Similar difficulties may arise in

undertaking to make payments to heirs at law. Accounting officers are not generally charged with the duty of making distribution of estates.

The injustice of ignoring the "legal representatives" of a decedent must be manifest. They represent creditors of estates as well as devisees and heirs at law. If payments be made directly to devisees or heirs at law, creditors of a decedent will be frequently, if not always, without remedy against the fund distributed in this mode. All these difficulties and this injustice will be avoided by holding that payments must be made to the proper "legal representatives" of decedents—their executors or administrators.

When real estate is, by judicial process, converted into money, the latter is for some purposes upon the doctrine of "Equitable conversion" for some purposes regarded as having the character of realty (1 Story, Eq. Jur., §§ 790-793; *Griswold et al. v. Frink et al.*, 22 Ohio St., 79). The act of August 5, 1861 (12 Stat., 304, sec. 36), meets any question which might otherwise on general principles of law be presented, by distinctly specifying to whom the surplus-proceeds of direct-tax sales shall be paid. No question can arise, therefore, growing out of the character of the fund—whether it is to be disposed of as realty or as *personalty*—since the statute determine this.*

The direct-tax act of August 5, 1861 (12 Stat., 304, sec. 36), provides for the payment by the proper collector at the time of any tax-sale of the surplus-proceeds of the sale *directly* "to the owner of the property [sold], or his legal representatives," and declares that:—

"If he or they cannot be found, or refuse to receive the same, then such surplus shall be deposited in the Treasury of the United States, to be there held for the use of the owner or his legal representatives, until he or they shall make application therefor to the Secretary of the Treasury, who, upon such application, shall, by warrant on the Treasury, cause the same to be paid to the applicant."

The duty of making tax-sales, and of paying the surplus-proceeds thereof to the original owner or his legal representatives, or of depositing the same in the Treasury, was, by the act of June 7, 1862 (12 Stat., 423, 425, secs. 5, 7, 12), transferred to tax commissioners. In this case, payment of the surplus proceeds of the tax-sale was not made at the time of the sale to the original owner or his legal representatives. The present claimants, cannot, therefore, be entitled to payment, unless the surplus proceeds of the tax-sale have been "deposited in the Treasury."

* On general principles, money recovered from the Government in payment of the claim of a decedent is to be administered as assets of his estate (3 Williams, Executors, 6th Am. ed., 1754, [1656]; *Foster v. Field*, 20 Pick., 67; *Thurston v. Doane*, 47 Maine, 79; *Thurston v. Lowder*, 40 *Id.*, 197; *De Valengin's Admrs. v. Duffy*, 14 Pet., 222; *Rogers v. Hosack's Exrs.*, 18 Wend., 319).

In relation to claims under section 36 of the act of August 5, 1861 (12 Stat., 304), the Secretary of the Treasury sent instructions to the Commissioner of Internal Revenue, for which see the Secretary's letter of March 17, 1884 (30 Int. Rev. Record, 86).

The doctrine of "Equitable conversion" is further considered in the foot-note at the end of this case.

This is the necessary effect of the statute. It declares that such proceeds "shall be deposited in the Treasury * * * , to be there held for the use of the owner or his legal representatives." These proceeds are to be so held, until the proper claimant "shall make application therefor," that is, for money *so deposited* in the Treasury. The act of March 3, 1883 (22 Stat., 595), recognizes this by directing payment "under the provisions of the act of August fifth, eighteen hundred and sixty-one." This question has, *in principle*, been decided in *United States v. Ross* (92 U. S., 284). When claims for a refund of the purchase-money are made under the act of June 8, 1872 (17 Stat., 332, sec. 9), by evicted purchasers, they are only required to show that the purchase-money at the tax-sale "has been paid into the treasury, or to any person legally authorized to receive the same for the United States." This places such evicted purchasers in a different position from that of the original owners, as to the evidence required to support their respective claims. There is nothing in *United States v. Lawton* (110 U. S., 146, s. c., 18 Ct. Cl., 603) in conflict with this view.

It has already been shown that the Government assumed the duty of *administering a trust* as to the surplus-proceeds of the tax-sale. The acts of August 5, 1861, and June 7, 1862, construed together, required the proper tax-commissioners at the time of the tax-sale to pay such surplus-proceeds or trust-fund directly to the proper claimant. If he could not be found, or refused to receive the same, these acts required said commissioners to deposit the money in the Treasury to await the application for payment. As a question of legal ethics, and on principles of common law, the Government, in providing for the performance of these duties, and in otherwise administering this trust, is only required to adopt the means usually employed by it in the execution of its other powers—that is, to execute the statutes by appropriate officers or agents.

If the tax-commissioners failed to pay a claimant at the time of a tax-sale, or neglected to deposit the surplus-proceeds of such sale in the Treasury, the Government incurred no liability by reason thereof. Thus, it is said that "the Government is not responsible for the laches, however gross, of its officers" (*Gibbons v. United States*, 8 Wall., 275; *Dunnegan's case*, 2 Lawrence, Compt., Dec., 2d ed., 110).

In order now to authorize payment to a claimant for surplus proceeds of a sale under the direct tax acts, there must be evidence of the *substantive facts* of a sale, and that its *surplus proceeds have been "deposited in the Treasury."* The evidence of such deposit does not arise as a presumption of law from the fact of sale for money then paid to the tax-commissioners, and is not supplied by the legal presumption, that said officers have performed their duty. "The presumption that public officers have done their duty, like the presumption of innocence, is undoubtedly a legal presumption; but it does not supply proof of a *substantive fact*" (*Strong, J., in United States v. Ross*—92 U. S., 284—

overruling Ross's case—10 Ct. Cl., 424—arising under the Abandoned or Captured Property Act of March 3, 1863—12 Stat., 820).

When the estate of a decedent has been finally settled in the proper court of probate jurisdiction without having received payment of the surplus proceeds of a direct tax-sale, to which such estate may be entitled, the local law of the domicile of the decedent will determine, whether new administration will be required, or whether the former executor or administrator shall collect and administer this fund. In some States, even after the settlement by the probate court on an account rendered by an administrator, final in form, he may be required to administer and account for other assets (*McAfee v. Phillips*, 25 Ohio, St., 376). In other States an administrator *de bonis non* is appointed in such cases. The latter usage seems to prevail in Florida.

The claimants in this case being *heirs* and legatees, and said claimants *not* being the "legal representatives" of the original owner entitled to payment, have no legal claim to the surplus proceeds of the tax-sale.

The papers herein will be returned to the Commissioner of Internal Revenue with a request to report through the Secretary of the Treasury a claim for payment in favor of the administrator *de bonis non cum testamento annexo* of the original owner.

TREASURY DEPARTMENT,

First Comptroller's Office, March 13, 1884.

FURTHER PROCEEDINGS IN THIS CASE.

January 28, 1884, James Burt was, on the application of "John Caldwell Calhoun, Benjamin A. P. Calhoun, and William Lowndes Calhoun, sole heirs-at-law of Benjamin Putnam," appointed by the proper probate court in Florida administrator *de bonis non cum testamento annexo* of the estate of said Benjamin Putnam, deceased. March 15, 1884, the Commissioner of Internal Revenue, in a letter to the Secretary of the Treasury, returned the papers with a recommendation, that the claim be allowed for \$3,214.50 in favor of said Burt as administrator *de bonis non cum testamento annexo* of Benjamin Putnam, deceased. The Commissioner, in his letter, says, that:

"The payment of the money [the proceeds of the tax-sale], to the commissioners [appointed under the direct-tax act], I regard as a payment into the Treasury, as far as the rights of the claimants under section 36 of the act of August 5, 1861, are concerned." *

* Under a similar statute, the Supreme Court, in clear terms, took a different view. The Abandoned or Captured Property Act of March 3, 1863 (12 Stat., 820), authorized the sale of abandoned or captured property in any State or Territory designated as in insurrection, and required the proceeds of such sale to be paid into the Treasury. This act gave to the original owner the right within a specified time to "prefer his claim to the proceeds * * * in the Court of Claims," and to recover the amount thereof, less the expenses of sale, "on proof to the satisfaction of said court of his

March 24, 1884, the Secretary of the Treasury transmitted the papers to the First Comptroller.

DECISION BY WILLIAM LAWRENCE, *First Comptroller*.

The claimant, James Burt, as administrator *de bonis non cum testamento annexo* of the estate of Benjamin Putnam, deceased, is entitled to payment of the \$3,214.50, and a balance will be certified accordingly.*

TREASURY DEPARTMENT,

First Comptroller's Office, March 29, 1884.

ownership of said property, of his right to the proceeds thereof," and of loyalty. The Supreme Court in *United States v. Ross* (92 U. S., 282), held that:

"It is incumbent upon a claimant * * * to establish by sufficient proof that the property captured or abandoned came into the hands of a Treasury agent; that it was sold; that the proceeds of the sale were paid into the Treasury of the United States; and that he was the owner of the property, and entitled to the proceeds thereof. All this is essential to show that the United States is a trustee for him, holding his money. That there is in the Treasury a fund arisen out of the sales of property captured or abandoned, a fund held in trust for somebody, and that the claimant's property, after capture or abandonment, came into the hands of a quartermaster of the Army or a Treasury agent, is not sufficient. There must be evidence connecting the receipt of it by the Treasury agent with the payment of the proceeds of sale of that identical property into the Treasury. We do not say that the evidence must be direct. It must, however, be such as the law recognizes to be a legitimate medium of proof; and the burden of proof rests upon the claimant who asserts the connection."

The court then discussed the evidence and the legal presumption in favor of the performance of official duty, and showed that payment of the proceeds of the sale of a particular lot of property into the Treasury is a *substantive fact*, and that the presumption of the performance of official duty "does not supply proof of a substantive fact," either as a legitimate inference of fact, or as a presumption of law. And in *Manning v. Insurance Co.* (100 U. S., 698), the court said that: "The only presumptions of fact which the law recognizes are immediate inferences from facts proved." See *United States v. Cruvell* (14 Wall., 1), and *United States v. Pugh* (99 U. S., 265). The principle thus settled by the Supreme Court is not at all changed by *United States v. Lawton* (110 U. S., 1463 s. c. 18 Ct. Cl., 603; s. c. 30 Int. Rev. Record, 47.)

Section 9 of the act of June 8, 1872 (17 Stat., 332), relates, as other statutes do, to the surplus proceeds of direct tax-sales; all these statutes are *in pari materia*; and every one of them throws some light upon the others. This section gives to the purchaser a right to a refund of the amount originally paid by him, upon an eviction by the judgment of any United States court, "if the same has been paid into the Treasury, or to any person legally authorized to receive the same for the United States." This necessarily implies, that, in the opinion of Congress, a "payment * * * [to such person] [is not] a payment into the Treasury"; and, hence, a payment at a direct tax-sale to the tax commissioner is neither in law nor in fact a payment into the Treasury.

The First Comptroller will require evidence in conformity with the principles established by the Supreme Court.

*The following discussion of the terms, "legal representatives," and of the doctrine of "equitable conversion," throws some light on the questions arising in the foregoing case:

The construction of the words, "legal representatives," has furnished a fruitful topic of controversy.

It is clear that there are two classes of representatives, real and personal, both of which may be embraced under the words mentioned.

Personal representatives, i. e., executors or administrators, "entirely represent the deceased, and possess, generally speaking, all his rights, and are liable for all his te-

sponsibilities, in so far as they have assets (i. e., to the amount of his *personal estate*), the rights and liabilities of which they in fact represent.

The *real representative* * * * represents the deceased less completely than does an executor. The heir or devisee represents in fact the rights and liabilities of the real estate" (Dicey, Parties, 205, 206; Williams, Executors, 6th Am. ed., 1529 *et seq.*).

This distinction between real and personal representatives is recognized in Grand Gulf R. R. Co. v. Bryan, 8 Mississippi, 275; Card v. Card, 39 N. Y., 323; Lee v. Dill, 39 Barb., 520; Phyfe v. Phyfe, 3 Bradf., 47; Delauney v. Burnett, 9 Ill., 454; Winfield, Adjudged Words and Phrases, 462, 532; Burrill, Law Dict.; 2 Steph., Com., 6th ed., 217, ch. vii; Co. Litt., 209; Bac. Abr., "Executors and Administrators," (H), "Heir and Ancestor," (F); Crabtree v. Bramble, 3 Atky., 686.

For purposes of clearness it is well to examine the interpretation of the words, "legal representatives," when used (1) in wills, and (2) in contracts and statutes.

1. When used in wills, *prima facie* they mean executors or administrators; and the burden of proof lies upon the person, who contends to the contrary, to show from *the context of the will*, that the testator has not used those words in their primary and original signification. (Atherton v. Crowther, 19 Beav., 448; Saberton v. Skeels, 1 Russ. and M., 587; Re Crawford's Trusts, 2 Drew., 230; King v. Cleaveland, 4 De G. and J., 477; Hawkins, Wills, 107 *et seq.*; Evans v. Charles, Aust., 128; Long v. Blackall, 3 Ves., 486; Holloway v. Holloway, 5 Id., 402; Price v. Strange, 6 Madd., 159.)

In re Crawford's Trusts, *supra*, the learned vice-chancellor thoroughly investigates the authorities and general doctrine on the construction of the word, *representatives*, in a will, and concludes that, though the indications collected from the whole of the will may require it to be construed to mean one thing or another according to the intention of the testator, yet its primary or ordinary legal meaning of executors or administrators should never be departed from, unless the intention of the testator to use it in another sense is clear, and that slight circumstances of such intention ought not to be considered. But it must be conceded, that the rule is not a strong one, and that the word in question may also mean persons who take under the statutes of distributions in case of intestacy. In this sense, the word, *representatives*, is equivalent to *heirs*, taking by way of substitution (Smith v. Palmer, 7 Hare, 225; Stockdale v. Nicholson, Law Rep., 4 Eq., 359; Hawkins, Wills, 107 *et seq.*).

Though, therefore, "legal representatives," in the strict, and, perhaps, in the popular or professional sense, mean nothing more or less than executors or administrators, yet, when bequests have been made to "legal representatives," courts have frequently sought to give effect to the intention by means of some *secondary sense* of the phrase; because it could not be reasonably presumed that it was the purpose of the testator to make such gifts *beneficially* to the executors or administrators, whose relation is rather *official* and *fiduciary*, than *personal* to the testator (2 Redf., Wills, 1st ed., 401; 1 Roper, Legacies, 128; Hawkins, Wills, 108; Williams, Executors, 6 Am. ed., 1217-1225; Theobald, Wills, 175; O'Hara, Int. of Wills, 305; Grylls' Trusts, Law Rep., 6 Eq., 589; Briggs v. Upton, 7 Law Rep., Ch. App., 376; Bridge v. Abbot, 3 Br. Ch. cases, 224; Cotton v. Cotton, 2 Beav., 67; Baines v. Ottey, 1 Myl. and K., 465; Jennings v. Gallimore, 3 Ves., 146; Phyfe v. Phyfe, 3 Bradf., 45; Thompson v. Young, 25 Md., 450; Brent v. Washington, 18 Gratt., 526; Gibbons v. Fairlamb, 26 Pa., St., 217; Gourdin v. Shrewsbury, 11 S. C., 2). The construction of the phrase, "legal representatives," in wills, as synonymous with *next of kin* has been allowed in order to effect the intention of the testator, as the next of kin may be said, in a loose and popular sense, to *represent* the deceased (2 Jarman, Wills, 5 Am. ed., 649, and cases cited). Where the context, and obvious meaning of the expression, *representatives*, make "descendants" the best construction that can be given to it, the courts so construe it (Atherton v. Crowther, *supra*; Styth v. Monro, 6 Sim., 49).

2. When used in a deed, the words, *legal representatives*, have been declared susceptible of so many arguable constructions of a plausible kind, that, if a person using them desires to have them acted upon by a court of justice, he is bound to supply a context to explain them (Tipping v. Howard, 6 E. L. & Eq., 99). But see Cox v.

Curwen (118 Mass., 198), where they were construed to have the ordinary meaning of executors and administrators. See also 3 Op. Att.-Gen., 29. In insurance policies, the words have been construed differently by different courts. In *Loos v. John Hancock Ins. Co.* (41 Mo., 538), it was held, that a policy payable to the "heirs or representatives" of the assured, should be paid to the child of the assured, as next of kin. But this case, though relied upon by counsel, was not followed in *Wason v. Colburn* (99 Mass., 342), which held that the administrator under similar circumstances "became entitled, by well-settled principles of law, to collect the amount due, and hold it as part of the estate of the intestate."

The statutes of the several States, which have allowed parties to be considered competent witnesses, generally contain the exception, that "no person shall be allowed to testify * * * when the adverse party * * * is the representative of a deceased person, when the facts to be proved transpired before the death of such deceased person." The word, *representative*, in such acts has been construed to apply, not only to executors or administrators of a deceased person, but also to persons who had succeeded to the right of the deceased, whether by purchase or descent (*Davis v. Davis*, 26 Cal., 23). In New York, the word in a similar act was held to extend only to executors or administrators (*McCray v. McCray*, 12 Abb. Pr., 1). But this case was criticised and departed from in *Lee v. Dill* (39 Barb., 516), where it is said, that representatives are *real* or *personal*, the former being the heirs at law, and the latter, ordinarily the executors or administrators, and that the term in the act includes both classes.

The cases in New York do not, however, go as far as those of California, in regarding as a *representative* within the meaning of the act, one who succeeds to the right of the deceased by purchase. (See *Traphagen v. Traphagen*, 40 Barb., 537.)

An act of Pennsylvania which provided that "all * * * persons and their *legal representatives*, who * * * settled on the * * * river Susquehannah, &c., shall be allowed a right of pre-emption to their respective possessions," &c., was required to be construed in *Duncan v. Walker* (1 Yeates, 213; S. C., 2 Dall., 205). The question before the court was, "Whom do the words *legal representative* designate?"

It was held that:

"As they relate to *lands* in this instance * * * , the words are to be considered as referring to *heirs*."

This case was followed and its principles extended in *Hartley v. Bryan* (6 Serg. and Rawle, 83), the syllabus of which is as follows:

"The '*legal representatives*' of those persons in whose favor warrants are directed to be drawn by the Auditor-General on the State treasurer, under the provisions of the act of 29th March, 1813, entitled, 'An act for the relief of sundry land-owners in the manor of Springettsburg, in the county of York,' are *not the representatives of the personal estate of the landholder, but his representatives in the land itself*."

Where, therefore, the land was sold under a judgment against the landholder, it was held, that the sheriff's vendee, and not the administrator of the landholder, was entitled to the money directed by that act, to be paid to the landholder or *his legal representatives*."

Both of the cases concur in the opinion, that, though the expression, *legal representatives*, in the abstract might appear ambiguous, yet it was explained by the subject-matter; and that, land *ex vi termini* importing real estate, the legal representative could not be in legal contemplation of the *administrator*.

By act of Congress of the 17th February, 1815, persons owning lots of land in the "Missouri Territory," which were materially injured by earthquake, were authorized to locate the like quantity of land, &c., on any of the public lands of that Territory, the sale of which was authorized by law. In an action of ejectment brought by a purchaser of such a lot from the heirs of the first owner, it was shown that, as it was difficult to ascertain who were the owners of the land, the form of certificate adopted by the then recorder was made out to the original owner or his *legal representative*. The court held, that the person acquiring title from the original owner by purchase

or descent was his *legal representative* (*Bryan v. Wear and Hickman*, 4 Mo., 111). In the case of *Delauney v. Burnett* (9 Ill., 490), there is a long and able discussion of the meaning of the terms, *legal representative*, employed in an act of Congress of March 12, 1828, granting to occupants of lots in the town of Galena, and to their "*legal representatives*," a pre-emption right to the lots so occupied, &c. It was held, that a purchaser from one of these occupants became his *legal representative* within the spirit, meaning, and intention of the act of Congress. In a similar case in Mississippi (*Grand Gulf R. R. Co. v. Bryan*, 8 Miss., 234), the court said:—

"We deny that the words, '*legal representatives*,' as used in the act of Congress, mean children, or heirs only. In legal parlance, the executor or administrator is most commonly called the legal representative. Still, in regard to things real, the heir is also the legal representative, and so is a devisee, who takes by purchase. Heirs may be the legal representatives, or they may not * * *. The act of Congress was evidently intended to have a broader signification than that contended for * * *. If the word '*heirs*' only had been used, it would have excluded assignees and grantees. An assignee or grantee is a legal representative of the assignor or grantor, in regard to the thing assigned or granted. If Congress intended that heirs only should be entitled to represent the original settler, it is remarkable that the word '*heirs*' is not used * * *. As Congress used a phrase more comprehensive, we must suppose that other persons besides heirs were intended. General expressions in a law must be construed to have a general application, unless there be a clear indication that they were intended to be used in a restricted sense. Representative is one who exercises power derived from another. A purchaser derives his power over the estate from his vendor. On this interpretation of the words, '*legal representative*,' the complainant's claim doubtless originated."

See also *Montgomery v. Landusky* (9 Mo., 705), where it was decided, that the recorder's certificate, issued to the *legal representative* of A, when A had, before the certificate issued, sold the lot to B, would not operate to the benefit of the heirs of A. It is said *arguendo* in *Delauney v. Burnett*, *supra*, that:—

"The important question is not what elementary writers understand by the terms [*legal representatives*], but what did the Congress of the United States mean when in this and similar laws, the term, '*legal representative*,' is employed."

The court, in delivering the opinion, seems to take the same view, and declares that—

"The action of the General Government has been uniform and consistent in accordance with the principles laid down in this decision."

And the court adds, that, though it could find no case precisely parallel in principle with the one before it (except the case of *Montgomery v. Landusky*, 9 Mo., 714), yet it could not doubt that, had the case actually been presented to the highest judicial tribunals of the country, the result would necessarily have been the same as that to which it had arrived; for it seemed to be the one warranted by the intention of the acts of Congress, and the constant usage and practice of the Government.

See *Hammond v. Mason and Hamlin Organ Co.* (2 Otto, 724), *Hamilton v. Kingsbury* (15 Blatchf., 67), and *Guerry v. Kinsler* (3 S. C., 423).

The conclusion reached after a careful survey of the authorities is, that the words, "*legal representatives*," mean in *wills*, *primarily* executors or administrators, but that when a bequest is made to "*legal representatives*," the clear presumption is that the next of kin or descendants are meant to be designated; and that in *contracts*, whilst the authorities are very conflicting, it may be intimated that the more carefully considered opinions declare that the words must be construed in their ordinary sense of executors or administrators. In *statutes and in contracts*, executory or executed, whose subject-matter is lands, and *not the proceeds of sales thereof*, it is safe to say that heirs are always contemplated by these words, and that the tendency is to embrace under them, when occasion requires it, devisees and alienees also.

In the determination of the present question, regard must be had for the subject-matter and for the spirit and intention of the act of Congress.

In considering who is the proper claimant to the *surplus* of the proceeds of the sale of lands for the payment of direct taxes, when the owner of such lands has died before it has been turned over to him, the act of August 5, 1861 (12 Stat., 304, sec. 36),

requiring it to be paid to his "legal representatives," it is necessary to inquire concerning the character of the subject-matter—the *surplus* of the proceeds of the sale. If it must be considered *really*, it goes to the heir or devisee; if *personally*, to his executor or administrator.

The consideration of this question involves the doctrine of equitable conversion, which, founded upon the principle that "Equity regards that as done which ought to be done," applies not only when the owner of property absolutely directs or stipulates that its nature be changed, but also when there has been a *legislative direction* to the same effect (*Dixie v. Wright*, 32 Beav., 662; *Re Horner's Est.*, 5 De G. & Sm., 483; *Re Stewart*, 1 Sm. & Giff., 39; *Taylor's Settlement*, 9 Hare, 596; *Adams*, Equity, 6 Am. Ed., 144 n).

"Conversion by *paramount authority*, [which] includes the particular instances of *compulsory purchases and taking of land* by railway companies, and others possessing such statutory powers, and sales of land by order of court for the purpose of settling the estates of infants and lunatics, or of partition, or of paying debts, and the like, [presents] * * * a question * * * the exact converse of that which arises under the ordinary form of conversion. The question [in ordinary conversion is], Is the property, although not actually converted, to be treated as converted? The question [in conversion by paramount authority] presents itself, Is the property, although *de facto* converted, to be treated to any extent as *not* converted? Where land is purchased or taken under compulsory powers conferred by statute, and the owner is *sui juris*, a conversion is effected; the purchase money, although not yet actually paid, becomes to all intents personal property; but if the owner is an infant or a lunatic, or the land is in settlement, the purchase money remains land: there is no conversion" (3 Pomeroy, Equity Jurisprudence, § 1167, citing *ex parte Hawkins*, 13 Sim., 569; *In re Manchester*, etc., R'y, 19 Beav., 365; *Regent's Canal Co. v. Ware*, 23 *Id.*, 575; *Righton v. Righton*, 36 L. J., Ch., 61; *In re Skeggs*, 2 De G. J. & S., 533).

Where land has been taken not by voluntary negotiation, but by the compulsory proceedings authorized by statute, and the money is paid into court, it continues to be real estate until it is taken out by some person having a right to elect to treat it as money, that is, by some person *sui juris* who is an unfettered owner. If the owner is an infant, or a lunatic, or if the land is subject to a settlement, the money necessarily retains its character as real estate (*In re Stewart*, 1 Sm. & Giff., 32, 33; *In re Bagot*, 31 L. J., Ch., 772; *Dixie v. Wright*, 32 Beav., 662; *In re Wharton*, 5 De G. M. & G., 33; *In re Sloper*, cited 22 Beav., 198; *In re Harrop*, 3 Drew., 726; *In re Barker*, L. R., 17 Ch. D., 241; *Kelland v. Fulford*, L. R., 6 Ch. D., 491; *Smith v. Bayright*, 34 N. J., Eq., 424).

Such money will not pass by a bequest of personal property (*In re Skeggs*, 2 De G. J. & S., 533; 3 Pomeroy, Equity Jurisprudence, § 1167, n).

"Where land is sold by *order of the court* for any purpose, it is a fixed principle upon which the court always proceeds that the character of the property should be changed only so far as may be necessary to accomplish the particular purpose. Where land is thus sold, and there is any surplus of money after satisfying the purpose for which the sale was made, such surplus is always regarded and treated as real estate" (3 Pomeroy, Equity Jurisprudence, § 1167, and note; *Cooke v. Dealey*, 22 Beav., 196; *Jerny v. Preston*, 13 Sim., 356).

Cooke v. Dealey, *supra*, was a case in which a testator devised real estates, subject to his debts, &c., to A. The lands were all sold in an administration suit, to which the devisee was a party. After the payment of debts, &c., there remained a sum in court at the death of the devisee. *Held*, that it was of the character of real estate and passed to her heir.

The general principle recognized in the decision is the one that, it is said, underlies the case of *Ackroyd v. Smithson* (1 Brown, Ch. C., 503), "so celebrated for Lord Eldon's argument," viz. that when more real estate is sold than is necessary the conversion is complete to the extent to which the purchase-money was required for the particular object for which the sale took place, but the excess, though in the form of

Payment of Surplus Proceeds of Direct Tax Sale—Putnam's Case. 171

money, remains as before, impressed with the character of land. This case and *Jermey v. Preston*, *supra*, are questioned, *obiter*, by Sir George Jessel, M. R., in *Steed v. Preece*, decided in 1874 (L. R., 18 Eq., 192), who says in reference to the judgment in *Cooke v. Dealey* :

"[It] is based on a general principle assumed to have been laid down in *Ackroyd v. Smithson*, viz, that the conversion of real estate into personalty only takes effect to the extent of the object required, and that beyond this the rights of the parties remain the same as if no conversion had taken place. But all that *Ackroyd v. Smithson* decided was, that a conversion directed by a testator is a conversion only for the purposes of the will, and that all that is not wanted for these purposes must go to the person who would have been entitled but for the will. It does not decide that if the court or a trustee sell more than is necessary there is any equity to re-convert the surplus for the benefit of the heir at law of the person entitled at the time of the sale * * * ; it seems to me that if a conversion is rightfully made, whether by the court or a trustee, all the consequences of a conversion must follow; and that there is no equity in favor of the heir or any one else to take the property in any other form than that in which it is found; and that the sole question to be considered in all these cases is, whether the estate has been rightfully or wrongfully sold."

It has been held, that, after land has been appropriated under eminent domain proceedings, and the owner dies intestate before the appraisal of damages, the title to the land, together with the claim against the State, descends to the heir. (*Ballou v. Ballou*, 78 N. Y., 325). The sum awarded for damages in such a case is regarded as real estate (*Simonds v. Simonds*, 112 Mass., 157).

But it was decided in *Emerson v. Cutler* (14 Pick., 108, 119), that, where real estate devised to a female infant was sold pursuant to a license of court, and she afterwards married and died under age, the proceeds of the real estate were personal estate; and so also were damages paid for lands of such infant taken for public use as a highway. The doctrine of conversion was considered by the court as not applicable to such a case; and it declared, that the title of the ward was effectually divested by the alienation made by force of the law; that a sum of money was acquired as an equivalent; and that at death the property to be distributed was personal.

The result is, that, when a claim is made under section 36 of the act of August 5, 1861 (12 Stat., 304), the "surplus proceeds" of a direct-tax sale are to be regarded as impressed with the character of personalty, either (1) on common law principles, or (2) by the statute, or by both, and, at all events, by the statute, at least so far as to require payment to be made to the executors or administrators of a deceased claimant. When payment has been thus made, the local courts of probate or equity jurisdiction at the domicile of the decedent will necessarily decide, whether the money so paid will pass to the distributees under the local statute of distribution, or will be regarded as impressed with the character of realty, and so decreed to be paid to the heirs of the decedent. The final decree of the highest court of a State on this subject, so far as affected by the direct-tax acts, may be subject to review by the Supreme Court of the United States (Rev. Stat., 709).

After the foregoing decision of the First Comptroller the Court of Claims in April, 1884, decided a case which will be reported in nineteenth Court of Claims Reports, as follows :

COURT OF CLAIMS.—No. 13411.

BENJAMIN CHAPLIN, JR., EVELINE M. CHAPLIN, AND
LAURA E. DALY
v.
THE UNITED STATES.

} Motion to dismiss.



RICHARDSON, J., delivered the opinion of the court.

This motion to dismiss the petition is made by the defendants to obtain the judgment of the court upon the question whether or not the claimants are the proper parties to bring the action upon the facts set out in the petition.

The facts alleged are substantially as follows :

The claimants' father, Benjamin Chaplin, was the owner in fee-simple of a parcel of land in Saint Helena Parish, Beaufort district, South Carolina, upon which a direct national tax was assessed under the provisions of the act of August 5, 1861, chapter 45 (12 Stat. L., 304), and the act of July 7, 1862, chapter 99 (12 Stat. L., 422.)

The tax not having been paid, the whole property was advertised to be sold for non-payment thereof, and was bid off at the public sale in March, 1863, by the United States, under the provisions of said acts, for the sum of \$102.99, more than enough to satisfy the tax, cost, charges, and commissions. The defendants thereby acquired title to the property, and became bound, by the terms of section 36 of said act of 1861, to hold such surplus, in the language of the act, "for the use of the owner or his legal representatives, until he or they shall make application therefor to the Secretary of the Treasury, who, upon such application, shall, by warrant on the Treasury, cause the same to be paid the applicant" (*Taylor's Case*, 14 C. Cls. R., 339; affirmed on appeal, 104 U. S., 216; *Lawton's Case*, 18 C. Cls. R., 595; affirmed on appeal, 110 U. S. R—).

Said Benjamin Chaplin died March 16, 1874, without having made application to the Secretary of the Treasury for the payment to him of said surplus. The present claimants are his sole heirs at law, and as such have demanded payment from the Secretary of the Treasury, who has refused their application, and they now bring this action. The question is whether the "legal representatives" for whose use the United States are to hold the surplus of the proceeds of sales in such cases are the heirs at law who inherit the real estate, or the executors or administrators who take the personal estate of the deceased.

In a simple case of this kind, where there was no trust, and no other interest in the property than that of the claimants' ancestor, when the sale was made, we have no doubt that the surplus due to the sole owner of the property in fee was personal estate, and on his death passed to his legal personal representatives, who are his executors or administrators, and not to his heirs at law.

The right to the money in the Treasury was a chose in action, a claim against the United States, which the claimants' father might have enforced by application to the Secretary or by suit in this court. Such a demand was personal and could not be held, even in equity, to be subject to the law of real estate merely because it was the proceeds of the sale of realty.

At the time of the sale, the claimants had no interest in the estate, either equitable or otherwise. They were strangers to the property of their father until his death. Then the real estate of which he died seized and possessed, in the absence of a will, passed to them, but they acquired no rights as heirs at law to the proceeds of land sold by him during his life-time.

The motion is sustained.

IN THE MATTER OF THE LIABILITY OF THE UNITED STATES TO PAY
TREASURY NOTES ISSUED BY THE REPUBLIC OF TEXAS UNDER AN ACT
OF ITS CONGRESS PASSED JUNE 9, 1837.—TEXAS-TREASURY-NOTE CASE.

1. The United States is not now under any legal obligation to pay or redeem the Treasury notes of the Republic of Texas.
2. There is no appropriation available to make payment of such Treasury notes.
3. Construction given to joint resolution of Congress of March 1, 1845 (5 Stat., 797); joint resolution of December 29, 1845 (9 Stat., 108); act September 9, 1850 (9 Stat., 446); act February 28, 1855 (10 Stat., 617).

February 13, 1884, N. S. Walton, by letter of that date at Austin, Traverse County, Texas, transmitted to the Hon. John Hancock, of the House of Representatives, a treasury note as follows:

\$100

The Treasurer of the Republic of Texas will pay to _____ or order one hundred dollars in twelve months from date, with interest at ten per cent. per annum, in accordance with an act of Congress passed June 9, 1837.

CITY OF HOUSTON, _____, 1838.

SAM HOUSTON,
President.

HENRY SMITH,
Sec. of Treas'y.

On this is an indorsement as follows:

Good. George J. Durham, Chf. Clk & Act'g Comp. Wm. G. Cooke.

Accompanying the treasury note is a paper as follows:

Filed by W. M. Walton.

I certify that the inclosed promissory note of the late Republic of Texas for one hundred dollars is genuine, being numbered 113 and dated June 9, 1838, the same bearing interest at 10 per cent. per annum from that date to January 1st, 1841.

Amt. of principal.....\$100. 00

Amt. of interest..... 25. 56

\$125. 56

Given under my hand this 26th day of January, 1861.

GEORGE I. DURHAM,

Chf. Clk and Act'g Compt.

(In pencil:) Dr. JOHN: Please tell me if the above is of value. Will the State pay it?

Yrs., &c.,

WALTON.

These papers were presented by Mr. Hancock to the First Comptroller for payment.

—
OPINION BY WILLIAM LAWRENCE, *First Comptroller.*

By the joint resolution of March 1, 1845 (5 Stat., 797), Congress gave consent to the erection of the Republic of Texas into a State; for admission into the Union, on the conditions named in the second section of said resolution, one of which was as follows:

"Said State, when admitted into the Union, after ceding to the United States, all public edifices, fortifications, barracks, ports and harbors, navy and navy-yards, docks, magazines, arms, armaments, and all other property and means pertaining to the public defense belonging to said Republic of Texas, shall retain all the public funds, debts, taxes, and dues of every kind, which may belong to or be due and owing said Republic; and shall also retain all the vacant and unappropriated lands lying within its limits, to be applied to the payment of the debts and liabilities of said Republic of Texas, and the residue of said lands, after discharging said debts and liabilities, to be disposed of as said State may direct; but in no event are said debts and liabilities to become a charge upon the Government of the United States."

These conditions were accepted by the people of Texas "by deputies in convention assembled" (9 Stat., 108, preamble to joint resolution approved Dec. 29, 1845), and the State was declared to be one of the United States of America, and admitted into the Union on an equal footing with the original States in all respects whatever.

Although the conditions of admission were accepted "by the people of Texas" and the State admitted into the Union under the joint resolution of Dec. 29, 1845, there appears to have been a controversy, subsequently, as to the liability of the United States for claims against

the State (or Republic) of Texas, and for the purpose of settling the question finally, as well as of fixing definitely the boundaries of the State and obtaining a relinquishment by said State of all territory claimed by her exterior to said boundaries, Congress passed the act of Sept. 9, 1850 (9 Stat., 446), in which certain propositions for the settlement of matters in controversy were submitted to the State of Texas, the third of which was as follows:

"The State of Texas relinquishes all claim upon the United States for liability of the debts of Texas, and for compensation or indemnity for the surrender to the United States of her ships, forts, arsenals, custom-houses, custom-house revenue, arms and munitions of war, and public buildings with their sites, which became the property of the United States at the time of the annexation."

Fourth,

"The United States, in consideration of said establishment of boundaries, cession of claim to territory, and relinquishment of claims, will pay to the *State of Texas* the sum of ten millions of dollars in a stock bearing five per cent. interest, and redeemable at the end of fourteen years, the interest payable half-yearly at the Treasury of the United States."

Fifth,

"Immediately after the President of the United States shall have been furnished with an authentic copy of the act of the general assembly of Texas accepting these propositions, he shall cause the stock to be issued *in favor of the State of Texas*, as provided for in the fourth article of this agreement: *Provided, also*, That no more than five millions of said stock shall be issued until the creditors of the State holding bonds and other certificates of stock of Texas for which duties on imports were specially pledged, shall first file at the Treasury of the United States releases of all claim against the United States for or on account of said bonds or certificates in such form as shall be prescribed by the Secretary of the Treasury and approved by the President of the United States."

The legislature of the State of Texas, by an act approved Nov. 25, 1850, enacted "that the State of Texas hereby agrees to and accepts said propositions, and it is hereby declared that the said State shall be bound by the terms thereof, according to their true import and meaning." (President's proclamation, 9 Stat., 1005, No. 10.)

By authority of the above act (act Sept. 9, 1850), \$5,000,000 of said stock, known as Texan Indemnity Bonds, was issued to the State of Texas; the remaining \$5,000,000, authorized by the act, on compliance with the proviso in the fifth section by the creditors of the State, was not issued.

Instead of this issue, however, Congress passed an act (10 Stat., 617), approved Feb. 28, 1855, "to provide for the payment of such creditors of the late Republic of Texas as are comprehended in the act of Congress of September 9, 1850, by which an appropriation of \$7,750,000 was made to pay those claims under certain restrictions, one of which was contained in the fourth section of this act, viz:

"Sec. 4. That before payment of the moneys aforesaid, the Secretary of the Treasury shall give notice, by public advertisement, for the

space of ninety days, of the time at which said payment will be made; and no payment shall be made on any bond, certificate, or evidence of debt which shall not, thirty days before the time limited by said notice, be presented at the Treasury Department."

Hence, payment of the note is clearly barred by the limitation imposed by this section. Of the amount appropriated, the sum of \$7,226,529.32 was paid during the fiscal year ending June 30, 1856. Payments continued to be made till 1862, when they appear to have been suspended during the war, but were afterward resumed, a few small payments having been made, and the appropriation was carried on the books of the Treasury till June 30, 1877, at which time the balance remaining (\$101,113.27) was carried to the surplus fund. Hence, there are no funds available out of which the note could be paid, even if it were not barred by limitation.

The Treasury note above mentioned cannot be paid by the United States.*

TREASURY DEPARTMENT,

First Comptroller's Office, February 20, 1884.

IN THE MATTER OF THE RIGHT OF A SECRETARY OF LEGATION TO RECEIVE PAYMENT, AS BEARER OF DISPATCHES, FOR EXPENSES INCURRED WHILE IN TRANSIT TO HIS POST OF DUTY AS SUCH SECRETARY, IN ADDITION TO HIS SALARY AS SECRETARY.—TRANSIT-EXPENSE CASE.

1. A Secretary of Legation with an annual salary of \$2,500 fixed by law, who is appointed also bearer of dispatches, and performs the duty of this latter appointment while in transit to his post of duty as such Secretary, is prohibited by section 1743 of the Revised Statutes from receiving payment of his personal expenses incurred during such transit, there being no additional expense incurred by reason of carrying the dispatches.

January 23, 1883, Gustavus Goward was commissioned as Secretary to the United States Legation at Tokei (Yeddo), Japan, with an annual salary fixed by law at \$2,500. The time charged and allowed for salary while making the transit to his post is from February 28 to April 3, 1883, thirty-five days, \$242.81 (Rev. Stat., 1740). For the same period Mr. Goward presents an account for \$552.55 for "traveling expenses as bearer of dispatches under [State] Department instructions charged with the Korean treaty." A portion of these expenses is supported by vouchers, and all are certified as correct by Mr. Goward, and are approved by the Department of State.

April 17, 1884, the Fifth Auditor disallowed these charges, and the question is now presented to the First Comptroller to decide whether

* The deficiency appropriation act of July 7, 1884, provided for the payment of this note.

the claimant, in the settlement of his accounts, is entitled to be allowed said sum. These expenses were incurred during the period of transit, and only while *en route* from Washington to Tokei. It does not appear that any additional expense was incurred in performing the duty as bearer of dispatches.

DECISION BY WILLIAM LAWRENCE, *First Comptroller.*

The appointment of bearer of dispatches is not, in any case, specifically provided for by statute, but the Secretary of State in the "management of foreign affairs" has ample authority to make such appointment (Rev. Stat., 202). The payment of the expenses of such agent as may be lawfully entitled to receive it, can be made from the proper appropriation for "contingent expenses of foreign missions." The "personal instructions to the diplomatic agents of the United States in foreign countries," prescribed through the Department of State and published in 1874, contain these provisions:

"XXVII. This Department has been in the habit of sending by a special messenger the President's ratification of any treaty to be exchanged abroad, and occasionally of authorizing the diplomatic representatives of the United States to transmit, by a similar conveyance, treaties which they may have negotiated. It has always been, and will continue to be, expected, that other communications to the Departments will be sent by the public mails; or, if by private hand, that no promise be made to the person so employed of compensation, or of a reimbursement of his expenses, without the previous authority of the Department, and that no ground of expectation of compensation or of reimbursement of expenses be offered.

"This restriction is not intended to prevent diplomatic agents abroad from employing such couriers at the public expense when the mails are obstructed, or deemed unsafe, and when there may be occasions to address the Department on subjects materially affecting interests of the United States which might suffer from delay or reasonably apprehended interruption in the transmission of the dispatch. The exercise of the utmost discretion is, however, enjoined in judging of these exigencies. Whenever the minister shall determine to send a courier, he will forthwith inform this Department of the fact, assigning the reasons therefor, and stating the compensation he recommends to be allowed to him. The Secretary of State nevertheless reserves to himself the right in all cases to judge of the necessity for the employment of a messenger, and of the propriety of paying the whole or any part of the compensation which may have been recommended. This should be fully explained by the minister to the messenger before intrusting him with the dispatches.

"XXVIII. 1. The compensation to bearers of dispatches, when employed with an intention to compensate them, is not to exceed six dollars per diem for the time actually and necessarily occupied in that service. In addition to this, their traveling expenses, which are to consist exclusively of their passage-money, portorage, necessary hack-hire, meals, and lodgings, are allowed.

"2. No charges will be allowed for wines, liquors, cigars, washing, medicines and medical attendance, baths, or for any object of a merely

personal nature, except as stated above; nor will any charge under the head of sundries, or *et cetera*, be taken into consideration.

"3. Accounts made in conformity to the foregoing, and accompanied by vouchers, will be promptly adjusted and paid at the Department.

"No draft on this Department for any such account will be honored."

The claimant in this case, upon a proper account and vouchers, would be entitled to the payment of the traveling expenses in question, unless some statute prohibits the payment thereof. The Revised Statutes provide that:

"Sec. 1743. The compensation allowed by law to the various diplomatic and consular officers shall be in full for all the services rendered and personal expenses incurred by the persons respectively for whom such compensation is provided, of whatever kind such services or personal expenses may be, or by whatever treaty, law, or instructions they are required; and no allowance, other than such as is so provided, shall be made in any case for the outfit or return home of any such officer or person."

This section was taken from section 20 of the act of August 18, 1856 (11 Stat., 52), which, as well as the act of March 1, 1855 (10 Stat., 626, sec. 26), abolished the "outfit" authorized by act of May 1, 1810 (2 Stat., 608), and section 8 of said act of 1856 carried into section 1740 of the Revised Statutes provided a substitute for the "outfit" by regulating and limiting the amount to be paid for "compensation" by providing as follows:

"SEC. 1740. No ambassador, envoy extraordinary, minister plenipotentiary, minister resident, commissioner, chargé d'affaires, secretary of legation, assistant secretary of legation, interpreter to any legation or consulate, or consul-general, consul, or commercial agent, mentioned in Schedules B and C, shall be entitled to compensation for his services, except from the time when he reaches his post and enters upon his official duties to the time when he ceases to hold such office, and for such time as is actually and necessarily occupied in receiving his instructions, not to exceed thirty days, and in making the direct transit between the place of his residence, when appointed, and his post of duty, at the commencement and termination of the period of his official service, for which he shall in all cases be allowed and paid, except as hereinafter mentioned. And no person shall be deemed to hold any such office after his successor is appointed and actually enters upon the duties of his office at his post of duty, nor after his official residence at such post has terminated if not so relieved. But no such allowance or payment shall be made to any consul-general, consul, or commercial agent, not embraced in Schedules B and C, or to any vice-consul, vice-commercial agent, deputy consul or consular agent, for the time so occupied in receiving instructions, or in such transit as aforesaid; nor shall any such officer as is referred to in this section be allowed compensation for the time so occupied in such transit, at the termination of the period of his official service, if he has resigned or been recalled therefrom for any malfeasance in his office."

The claimant has been paid his salary while making the transit to his post, as Secretary of Legation. The statute (sec. 1743) declares that this "shall be in full for all the services rendered and personal expenses incurred" during that period. The statute thus makes a provision which

must be deemed *ample* for all such personal expenses. The claimant has, as Secretary of Legation, been paid a salary "fixed by law" (Act July 1, 1883, 22 Stat., 128), and for the same period, by the express terms of section 1764 and 1765 of the Revised Statutes, he cannot lawfully receive "any additional pay, extra allowance, or compensation in any form whatever * * * for any other service or duty whatever." The question, therefore, to be now decided is, whether the statute having provided a salary as compensation for the claimant "in full for all the *services* and *personal* expenses" he incurred during the period of transit, has denied his right to have *another* full compensation for the same personal expenses, so that he can by incurring *one* expense be twice paid for it. If he can thus be twice paid, the law adopts a policy of denying to him two compensations for the same or even additional service, but allows him to be twice compensated for *one expense* incurred. It seems clear that the *justice* and *policy* of double compensation applies as well to *expenses* as to *services*. As a matter of fact, an officer may in some cases perform all his *official duties* and may in addition perform unofficial services, and thereby with some show of justice assert a right to compensation as fairly *earned* therefor. Congress evidently saw that such claims would be made, and, with a purpose to distribute the real or supposed benefits of public employment, provided expressly that a salaried officer should not be paid for such other unofficial services, at least any compensation fixed by the discretion of any officer. But however well an officer may earn or deserve compensation for such unofficial services, it is difficult to perceive how, by any like rule of reason, he can have a just claim to be twice paid for one personal expense incurred. If twice, why not thrice, and so on indefinitely? It may be said it will cost the Government no more to pay such expenses to the claimant than to pay to another party selected as bearer of dispatches. So it would cost the Government no more to pay a salaried officer for the performance of unofficial duties than to pay an employé for the same service. But this cannot give the claimant in this case a right to double payment, unless the statute authorizes it. No statute does, in terms, authorize it. And the exclusion of *double* payment does not rest alone on the absence of authority to make it, but on an express prohibition. Section 1743 of the Revised Statutes expressly provides that the salary fixed by law for a Secretary of Legation as in this case "shall be in full for all * * * personal expenses incurred" by him on the transit to his post, "of whatever kind such * * * personal expenses may be, or by *whatever* treaty, law, or instructions they are required." The effect of this is, that when a Secretary of Legation, as such, in transit to his post, has incurred expenses thereby, the compensation prescribed by law during the period of transit is to be deemed payment in full for such expenses, as the section says, "by whatever treaty, law, or instructions they are required." These words of the statute must be construed as having *some purpose*. "Every word and clause should, if possible, have assigned to it a meaning, leaving no useless words" (Bishop, Written Laws, 82). The words

quoted from the statute do not necessarily refer to the right to double payment of expenses incurred by the transit as Secretary of Legation. They therefore had some other purpose. They can have no purpose but to deny the right of a consular or diplomatic officer to receive for the same period either compensation for services of *any other kind*, or payment for expenses incurred "by whatever [other] treaty, law, or instructions they [such services or expenses] are required." If, then, the *expenses* in this case were required under the law authorizing a bearer of dispatches to be sent, the compensation paid the Secretary of Legation as such is in full of such expenses. Section 1743 puts compensation for *services* and for *expenses* on the same footing. The right to extra compensation for extra services is prohibited as well by this section as by sections 1764 and 1765. Hence, as extra compensation is prohibited for extra services, double payment for expenses without any extra expense must be prohibited. Section 1743 declares that "no allowance, other than such as is so provided [as salary] shall be made in any case for the outfit or return home of any such officer or person"—Secretary of Legation, &c. The purpose of the whole section, it is clear, is absolutely to prohibit such officer or person from receiving any payment for *services* or *expenses* during the period of transit to, or return home from the foreign post of duty, except the authorized salary. The outward and return transit are placed on the same footing. No allowance for any purpose connected with such transit can be made, except for the authorized salary. It may be said that these provisions and their prohibition relate only to services and expenses for the transit made in an official capacity of a consular or diplomatic officer, and so do not prohibit payment to such officer for the transit and also for expenses as bearer of dispatches, although in fact they are the same expenses incurred during the time of transit. But the statute, by any fair construction, does extend its prohibition of double payment for the same expenses, whatever the purpose for which they are incurred may be called. When expenses are incurred for transit as Secretary of Legation, they do not cease to be such by calling them expenses as bearer of dispatches. And if they could be assigned as the expenses of bearer of dispatches, and thus save the same person his expenses as Secretary of Legation, the effect would be to relieve him of an *expense* which this statute contemplates to be paid from his transit salary as Secretary of Legation, and thus *indirectly* add to his emoluments, and in effect increase his salary. But it may be regarded as settled law, that the purpose of a statute (1) cannot be defeated by indirection, nor (2) the real substance of any matter be changed by changing its name.

(1) Sedgwick has said that "statutes are not to be evaded any more than they are to be disobeyed" (Const. and Stat. Law, 2d ed., 74, and cases cited: *Hannay v. Eve*, 3 Cranch, 242; *Humphrey v. Chamberlain*, 1 Kernan, N. Y., 274; *Hardcastle*, Statutory Law, 24, and cases cited).

"That which could not be done directly * * * cannot be done indirectly" (4 Coke, 24 b; *Caldwell v. The Mayor, &c., of Albany*, 9 Paige,

572, 575; Broom, Leg. Max., 732; Jones v. Waite, 5 Bing. N. C., 341; Armstrong v. Armstrong, 3 Myl. & K. 64; The Reward, 2 Dod., Adm. R., 271; Monroe v. Collins, 17 Ohio St., 665; Taylor v. Commissioners, 23 Id., 22; Walker v. Cincinnati, 21 Id., 14; Eichenlaub v. State, 36 Id., 140; State v. Hipp, Sup. Ct. Ohio, June, 1882).

(2) The *legal effect* of an act done or payment made is not changed by changing its name. This proposition is self-evident. The Supreme Court has said "a State cannot make a law designed to raise money to support paupers * * * an *inspection law* by calling it so in the title" (People v. Campagnie Générale Transatlantique, 107 U. S., 63). A case may be found which might be supposed to support a different view (Landrum's case, 16 Ct. Cl., 86). If so, its conclusion cannot be adopted now (Herndon's case, 1 Lawrence, Compt. Dec., 2d ed., 55). This subject has been elsewhere considered (Utah case, 2 Lawrence, Compt. Dec. 2d ed., 562).

The claimant, as bearer of dispatches, is not an officer (Meigs's case, 4 Lawrence, Compt. Dec., 588). And if he could be so called, and thus be entitled to receive the salaries of two offices, the claim in this case is not for these, but for a double payment for expenses incurred.

It is not alleged that the claimant incurred any expense as bearer of dispatches in excess of or other than those necessarily arising in his transit as Secretary of Legation. If he did, his right to payment as to such additional expense might be a subject of inquiry. It is not to be supposed that the claimant was instructed to go out of the usual and proper route of transit for him as Secretary of Legation. The charges made in his account show that the usual and direct route of travel was followed.

The claimant is not entitled to said sum of \$352.55, or to any part thereof. His account will be settled accordingly.

TREASURY DEPARTMENT,

First Comptroller's Office, April 30, 1884.

United States District Court, Middle District of Alabama, May, 1884.

IN THE MATTER OF THE MARSHALSHIP OF THE MIDDLE AND SOUTHERN DISTRICTS OF ALABAMA.—MARSHAL'S SUSPENSION CASE.

April 16, 1880, Mathias C. Osborn was commissioned for four years as Marshal of the Middle and Southern Districts of Alabama. March 17, 1883, during a recess of the Senate, the President suspended said Marshal from his office, and designated Paul Strobach to perform the duties thereof.

Held:

1. When the term of office of Marshal Osborn expired, then the term of office which Strobach was designated to fill also expired.
2. Section 1768 of the Revised Statutes construed.

May 1, 1884, after notice to Paul Strobach, William H. Smith, attorney of the United States, presented to the court a motion stating the

facts, on which he "now submits to the court whether said Strobach can now exercise and perform the duties of United States marshal under and by virtue of said designation, and asks the judgment of the court thereon."

May 8, 1884, Bruce, J., delivered the following opinion:

"It is brought to the notice of the court by a proceeding instituted by the direction and request of Benjamin Harris Brewster, Attorney-General of the United States, and upon the motion of Hon. William H. Smith, District Attorney of the United States for the Middle District of Alabama, in this court, a question is raised, as to whether Paul Strobach is now entitled to hold the office of United States Marshal for the Middle and Southern Districts of Alabama, or whether under the law there is now a vacancy in that office.

On the 17th day of March, 1883, during a recess of the Senate, the President of the United States suspended Mathias C. Osborn from the office of United States Marshal for the Middle and Southern Districts of Alabama, which office he had theretofore held, and designated Paul Strobach—in the language of the statute—as *a suitable person to perform the duties of such suspended officer in the mean time*.

Paul Strobach took the oath of office, gave the bond as required by law, and from that time has performed the duties of that office under such designation and temporary appointment up to the present time.

The commission of Mathias C. Osborn, as Marshal, is dated April 16, 1880, and section 779 of the Revised Statutes of the United States provides, that 'Marshals shall be appointed for a term of four years.' So that the four years for which Marshal Osborn was appointed expired on the 16th day of April last past; and the proposition of the District Attorney upon this motion is:

That when the term of office of Marshal Osborn expired, then the term of office which Paul Strobach was designated to fill also expired, and that there is now a vacancy in said office.

On the other hand it is claimed for Mr. Strobach that he is authorized to hold the office until the end of the next (the present) session of the Senate.

The law upon this subject is found in section 1768 of the Revised Statutes of the United States, which, omitting words unnecessary to be considered in the present inquiry, is as follows:

'During any recess of the Senate the President is authorized, in his discretion, to suspend any civil officer appointed by and with the advice and consent of the Senate, * * *, *until the end of the next session of the Senate*, and to designate some suitable person, * * *, to perform the duties of *such suspended officer in the mean time*; and the person so designated shall take the oath and give the bond required by law to be taken and given by the suspended officer, and shall, during the time he performs the duties of *such officer* be entitled to the salary and emoluments of the office, no part of which shall belong to the officer suspended.'

Marshal Osborn was suspended from office by the President March

17th, 1883, and the statute gives the President power to suspend until the end of the next session of the Senate.

Marshal Osborn could be suspended from office, however, only for the time during which he had been appointed to hold the office. If his term of office extended beyond the end of the next session of the Senate, then under the statute his suspension would extend to the end of the next session of the Senate, and Mr. Strobach, the person designated to perform the duties of the suspended officer in the mean time, would hold until the end of the session of the Senate—that is, if in the mean time no one should be nominated by the President and confirmed by the Senate to the office.

In this case, however, the term for which Marshal Osborn was appointed expired before the end of the next (the present) session of the Senate, and in such a case the suspension by the President could operate only upon the unexpired portion of Marshal Osborn's term of office, that is to say, from the date of the suspension March 17, 1883, to April 16, 1884.

It is not claimed, and it would be a solecism to say, that an officer could be suspended from an office for a period of time after his right to hold the office had ceased and expired.

Marshal Osborn's suspension from the office of Marshal ceased to operate on the 16th day of April, 1884, because his term of office expired at that time; and now the question is, what effect that had upon the right of Mr. Strobach to hold the office, he being the person who was designated by the President to perform the duties of the suspended officer in the mean time?

In what time, or during what time, is it that the person designated to perform the duties of the suspended officer may perform such duties? Is it not manifestly during the term of the suspension? How can the designation of a person to perform the duties of the suspended officer be for a greater period of time than that for which the suspension of the original incumbent of the office could operate? The statute evidently makes the measure of the suspension the measure of the time during which the temporary appointee may perform the duties of the office.

The question of the time during which the temporary appointee may hold the office is answered by the question, how long could the original incumbent of the office have held it if he had not been suspended from the performance of the duties of the office?

The answer to this question is the one already suggested, and the second clause of the statute strengthens this view. It shows that the temporary appointee is limited in the matter of salary and emoluments to the time he performs the duties of *such officer*—meaning the suspended officer.

The term of the original incumbent of the office and that of the person designated to perform his duties, in the case of a suspension, is one term, and the temporary appointee holds for that portion of the term during which the suspension operates.

His term of office is simply the complement of the other, and to fill up the hiatus in the office created by the suspension, and when the term of the original incumbent expires, then the term of the temporary appointee expires also.

Mr. Strobach was designated to perform the duties of the suspended officer, and when the term of such suspended officer (Osborn) expired, as it did April 16, 1884, then *ex vi termini* Mr. Strobach's term of office expired with it.

To hold that Mr. Strobach is entitled to hold the office to the end of the next session of the Senate, notwithstanding the fact that Marshal Osborn's term of office expired previous thereto, would be to hold that the President not only had power to suspend an officer and designate another person to perform the duties of such suspended officer in the meantime, but it would be to hold that the President might appoint an officer for a period of time during which there was no suspension of an officer, and this without the advice and consent of the Senate, which to my mind would be a departure from the true theory of the law on the subject, and would be doing violence to the statute itself.

The argument against this view is, that the statute is to be construed liberally to effect its purpose, and that Congress certainly intended that the temporary appointee should hold the office until the end of the next session of the Senate.

If the Congress so intended, it would have been easy to have added to the words in the statute after the words 'in the meantime', the words 'and until the end of the next session of the Senate'; but the Judiciary is not at liberty to interpolate words and make the statute different from what it is. The liberal construction claimed for this statute is not favored by section 1770 of the Revised Statutes, which provides that nothing in sections 1767, 1768, and 1769 shall be construed to extend the term of any office the duration of which is limited by law.

Some inconvenience may arise from the occurrence of a vacancy in the office, but whatever force there may be in argument *ab inconvenienti*, it is insufficient to control the construction of the statute as claimed here for Mr. Strobach.

The result of these views is, that there is a vacancy in the office of Marshal for the Middle and Southern Districts of Alabama, and the court so holds upon the motion made."

Thereupon, on the same day, May 8, 1884, the Court made an order as follows:

"* * * And the said motion having been fully argued by counsel and considered by the court, the judgment of the court is, that there is now a vacancy in the office of United States Marshal for the Southern and Middle Districts of Alabama, and that Paul Strobach is no longer authorized to perform the duties of Marshal of the United States for the Southern and Middle Districts of Alabama."

IN THE MATTER OF THE RIGHT OF A SHERIFF, WHO, IN MAY, 1883, BY WRIT OF ATTACHMENT, SEIZED TOBACCO AND CIGARS FOR THE PURPOSE OF SATISFYING, THE DEBT OF THE DEALER OWNING THEM, TO CLAIM THE REBATE PROVIDED BY ACT OF MARCH 3, 1883 (22 STAT., 489).—ATTACHMENT-REBATE CASE.

1. The claim of a dealer in tobacco for rebate under the act of March 3, 1883 (22 Stat., 489), does not pass to a sheriff, who, by attachment in favor of the creditor of such dealer, seizes the tobacco on which such claim from rebate arises.
2. A claim against the United States in favor of a party cannot be reached by attachment or garnishment at the instance of a creditor of such party.
3. Such claim is not subject to levy by writ of execution.
4. The incident generally passes by the grant of the principal, but a statute giving a claim as an incident of goods of a specified class, may limit the right to such claim to persons holding such goods at a fixed date.

The act of March 3, 1883 (22 Stat., 488), to reduce internal-revenue taxation, and for other purposes, reduces the tax on manufactured tobacco on and after May 1, 1883, and provides—

“That on all original and unbroken factory packages of smoking and manufactured tobacco and snuff, cigars, cheroots, and cigarettes held by manufacturers or dealers at the time such reduction shall go into effect, upon which the tax has been paid, there shall be allowed a drawback or rebate of the full amount of the reduction, but the same shall not apply in any case where the claim has not been presented within sixty days following the date of the reduction; and such rebate to manufacturers may be paid in stamps at the reduced rate; and no claim shall be allowed or drawback paid for a less amount than ten dollars. It shall be the duty of the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, to adopt such rules and regulations and to prescribe and furnish such blanks and forms as may be necessary to carry this section into effect.”

In 1883 Gillette Brothers, of Atlanta, Ga., were authorized dealers in tobacco. On the 16th April, 1883, William G. Rountree, sheriff of Dallas County, Alabama, levied a writ of attachment in favor of a creditor having a suit pending against them, on 3,528 pounds of tobacco and 119,950 cigars and cigarettes, and, having all in his possession as sheriff, on May 8, 1883, he made affidavit that he made the claim for rebate for the benefit of the parties interested in the result of said suit, and would hold the same to meet the judgment and order of the court in said attachment suit. May 11, 1883, he made proof in the form required by regulations of the Treasury Department, and the claim for \$642.13, and proofs in support thereof were filed in the office of Internal Revenue June 30, 1883. The question is now submitted to the First Comptroller to decide whether the claim shall be allowed in favor of the claimant sheriff.

DECISION BY WILLIAM LAWRENCE, *First Comptroller*.

I. The United States is an indispensable party in any judicial proceeding which seeks to reach money in its treasury in satisfaction of a

claim which it owes to a creditor. Neither the United States nor any officer thereof can be made a party in the attachment proceedings under which the claimant as sheriff seized the goods in question. These principles are sufficiently discussed in Keyser's case, (4 Lawrence, Compt. Dec., 313). It follows from these that the claimant is not entitled to payment, even if the creditors of Gillette Brothers were attempting to reach money due from the United States to that firm.

II. The act of March 3, 1883, gives a right to a rebate to *manufacturers and dealers*, who on May 1, 1883, held specified kinds of tobacco on which the tax had been paid. Such claim cannot be assigned before its allowance by any act of the parties (Rev. Stat., 3477). The sheriff did not and could not attach the claim for rebate. He simply attached the goods. A claim cannot be reached by levy. Thus, it is said, "in the greater number of the States, choses in action, and other personal property not capable of manual delivery, are reached by trustee process, foreign attachment, garnishment, or by proceedings supplemental to execution and not by direct seizure" (Freeman, Executions, 262a). So a creditor's bill may be supported after judgment (2 Story, Eq. Jur., 12th ed., 829 n; Demphy v. Kleinsmith, 11 Wall., 610; Barry v. Abbott, 100 Mass., 396; Pendleton v. Perkins, 49 Mo., 565). But no such proceeding has been commenced, and if it had been, neither the United States nor any officer thereof could be made a party to it, and so it could not be made available as to money owing by the Government.

III. The seizure of the goods does not carry with it the claim for rebate. This claim is not an incident of the goods which passes with their transfer. The statute gives the right to make a claim only to "manufacturers or dealers" who hold specified kinds of tobacco at the date of the reduction of the tax. The statute expressly fixes the right to make a claim, and limits it to such manufacturers or dealers. Between March 3, 1883, and May 1, 1883, a sale of tobacco by a dealer who had paid the tax thereon, would carry with it as an incident thereof the right to make a claim for rebate by a dealer owning it on the latter date. In such case the maxim applies—*accessorium non ducit sed sequitur suum principale*. (Broom, Leg. Max., 7th ed., 492.) But when, as in this case, an act of Congress gives a right to a claim as incident to goods of a specified class, it may limit the right to parties holding such goods at a fixed date.

IV. And if the statute could be construed to give the right to a person who, after May 1, 1883, purchased tobacco from a manufacturer or dealer then holding it, this would not aid the claimant in this case, because he does not show that he is the *owner* of such tobacco.

In any view which can be taken, the claimant has no right to payment.

TREASURY DEPARTMENT,

First Comptroller's Office, May 23, 1884.

IN THE MATTER OF THE RIGHT OF A MEMBER OF THE CAPITOL POLICE TO EXTRA COMPENSATION UNDER THE ACT OF MARCH 3, 1883, (22 STAT., 632).—ALLABACH'S CASE.

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1. Members of the Capitol Police are not entitled to extra compensation under the act of March 3, 1883.

The "sundry civil" appropriation act of March 3, 1883, makes divers appropriations and contains provisions including one as follows:

"To enable the Acting Secretary of the Senate and the Clerk of the House to pay the officers and employes of the Senate and House of Representatives respectively borne on the annual and session rolls on the third day of March, eighteen hundred and eighty three, one month's extra pay at the rate of compensation then paid them by law, which sum shall be immediately available." (22 Stat., 632.)

On the same day the following joint resolution was passed:

"Resolved • • • That the Clerk of the House be, and is hereby authorized and directed to pay to all those of the Capitol Police on the roll July first, eighteen hundred and eighty two, one month's extra pay, at the same compensation now paid them by law; and an amount sufficient to pay the same is hereby appropriated, out of any money in the Treasury not otherwise appropriated; the same to be made immediately available." (22 Stat., 644.)

Mr. P. H. Allabach, as a member of the Capitol Police, claimed and was paid one month's extra pay under the joint resolution, and afterwards claimed one month's extra pay under the act cited above.

The question presented to the First Comptroller to decide is, whether he is entitled to any compensation under the act of March 3, 1883. (22 Stat., 632.)

OPINION BY WILLIAM LAWRENCE, *First Comptroller*.

The Capitol Police are not entitled to compensation under the appropriation act of March 3, 1883 (22 Stat., 632), because they are not "officers and employes of the Senate and House of Representatives." That they are not such officers and employes may be deduced from (1) the nature of their appointment and duties, and from (2) the manner of their payment.

1. Under the legislation from 1860 until 1867, the members of that force were appointed by an officer known as "The Commissioner of Public Buildings and Grounds." But that office having been abolished in 1867, the appointment of members of the Capitol Police was vested in the Sergeant-at-Arms of the Senate and the Sergeant-at-Arms of the House of Representatives (Act March 2, 1867—14 Stat., 466, Sec. 2).

By act of March 3, 1873, still in force (17 Stat., 488), the appointment was vested in the Architect of the Capitol Extension and the Sergeants-at-Arms aforesaid. The three officers mentioned have organized under the name of the Capitol Police Board, of which the Architect is the

President. This board has the control of the police force, and makes such rules and regulations as are deemed proper.

The Capitol Police are, therefore, employes of this board, and not of either House of Congress or of the two Houses together. The Architect of the Capitol having a voice in their appointment and control, they cannot be considered employes of Congress.

The Architect of the Capitol, being an appointee of the President, is not an employe of Congress, and it has never been claimed, therefore, that his employes (sixteen in number) are sub-employes of Congress. It would not be pretended that they are within the meaning of the act of March 3, 1883, referred to, yet it must be granted that they are, if the Capitol Police are.

2. (a) It has been the custom of Congress to appropriate annually a sum sufficient for the salaries of the Capitol Police, with the direction that one-half thereof be paid into the contingent fund of the Senate, and one-half into the contingent fund of the House, and from such contingent funds they have been paid. The Secretary of the Senate has paid them monthly from January 1, to June 30, and the Clerk of the House from July 1, to December 31, in each year. That Congress did not regard the Capitol Police as employes of the Senate or House of Representatives, is manifested by the passing of a joint resolution expressly granting one month's extra pay to them, and on the same day, an act appropriating a sum of money for one month's extra pay to "the officers and employes of the Senate and House of Representatives."*

(b) The duties of the police known as the Capitol Police are not confined to the Capitol, they extend to the Botanical Grounds. (Rev. Stat.,

* While the debates in Congress cannot be referred to in construing statutes, yet, a reference to them as a kind of dictionary to show the sense in which words are used, supports the conclusion above stated. On the 3d of March, 1883, Senator Davis, of West Virginia, called up the joint resolution, No. 29 (H. R. 281), being the one which, when passed, is found in 22 Stat., 644; and upon this he made the following remarks:

"Mr. President, last session the House of Representatives passed a joint resolution, No. 281, and yesterday or this morning early I understand that it was called up and voted down without much consideration. The fact is that all the employes at both ends of the Capitol have been allowed an extra month's compensation *except the Capitol Police*," &c., &c.

In making these remarks the Senator evidently referred to the provisions of the sundry civil act of March 3, 1883 (22 Stat., 632), which required the Acting Secretary of the Senate and the Clerk of the House to pay the officers and employes of the Senate and House of Representatives one month's extra pay. To this statement of the honorable Senator, that the Capitol Police were excepted from the benefits of the sundry civil act, there was no dissent.

Senator Ingalls, also speaking on the same subject, made a similar statement as follows: "As all the other employes have received additional compensation, I can see no reason why the same should not be extended to the members of the Capitol Police." (Cong. Record, Vol. 14, Pt. 4, p. 3700.) It will be seen from the above that the Capitol Police have not been considered as officers or employes of the Senate and House of Representatives. (See *Artificial-Limbs Case*, 2 Lawrence, Compt. Dec., 2d ed., 401.)

Statutes may be construed by the aid of the Journals of Congress and the Congressional Record. (Blake v. National Banks, 23 Wall., 317.)

1826.) This would seem to indicate that they were not the employés of either or of both houses of Congress.

Statutes passed the same day on the same subject are to be construed as provisions of one act (*St. Martin v. New Orleans*, 14 La. Ann., 113; *People v. Jackson*, 30 Cal., 427; *Sedgwick, Construction Stat. and Const. L.*, 2d ed., 209, note).

Considering the act and the joint resolution of March 3, 1883, as one statute, the conclusion is necessarily reached that Congress intended to provide a month's extra pay to its employés, and to the Capitol Police. If these latter are employés, they are merely *specialy provided for* by a joint resolution, which cannot, however, entitle them to a month's extra pay in addition to that granted them by the act.

It is evident that in the legislative mind there was a clear distinction drawn between the Capitol Police and employés of the two houses of Congress. But if not, there is no reason to suppose that the joint resolution and the act together meant any more than a special provision for *one set* of employés and a general one for all the others besides, of the two houses of Congress (*State v. Bishop*, 41 Mo., 16).

It is not reasonable to suppose that the police force alone was provided for specially and generally, so as to enjoy double the extra compensation which all the others within the scope of the act received.

It has been suggested that the fact that the names of the Capitol Police are always included in the statement required of the Secretary of the Senate and the Clerk of the House by section 60 of the Revised Statutes implies that they are the employés of the Senate and House of Representatives.

But it is very apparent that this is not a well-grounded inference.

The Capitol Police, being paid out of the contingent fund of the Senate and of the House, as already mentioned, must be included in the statement required by this section to be made, but so must the name of every person to whom any portion of the fund has been paid, whether for services rendered or for supplies furnished. As disbursing officers of this fund, the Secretary of the Senate and Clerk of the House of Representatives pay the police force, and, as required by section 60 of the Revised Statutes, furnish the two houses with a statement containing the names of the members thereof because such statement must give the name of "every person to whom any portion of the fund has been paid."

This being the case, it is clear that the appearance of the names of the police upon said statement is no evidence that they were employés of the Senate and House. The statement merely shows that the payments were made out of the contingent fund, but it does not declare the official relation of any person to the Government, and could not, in fact, establish it by a declaration.

The claimant is not entitled to payment.

TREASURY DEPARTMENT,

First Comptroller's Office, April 2, 1884.

IN THE MATTER OF THE LIABILITY OF A PARTY TO PAY INTERNAL REVENUE SPECIAL TAX AS A WHOLESALE DEALER IN SPIRITS, WINES AND MALT LIQUORS, WHO SELLS IN ONE TRANSACTION TO ONE PURCHASER TWO OR MORE SEPARATE PACKAGES OF LESS THAN FIVE PROOF GALLONS OF "DIFFERENT KINDS" OF DISTILLED SPIRITS AGGREGATING MORE THAN FIVE GALLONS, AND HIS RIGHT TO A REFUND, IF HE HAS PAID MORE THAN THE PROPER PROPORTIONATE PART OF THE TAX FOR A YEAR, WHEN MAKING A SALE AS A WHOLESALE DEALER DURING THE TAX YEAR, WITHOUT FIRST HAVING PAID THE TAX.—LIQUOR-DEALER'S CASE.

1. Courts as a general rule adopt the construction placed upon statutes by executive officers charged with the duty of executing them, especially when such construction has been acted upon for a considerable time by such officers.
2. The act of February 8, 1875 (18 Stat., 311, sec. 18), as amended by section four of the act of March 1, 1879 (20 Stat., 333), provides that "every person who sells or offers for sale (1) *distilled spirits*, (2) *wines*, or (3) *malt liquors* in quantities of not less than five wine gallons at the same time shall be regarded as a wholesale liquor dealer." April 2, 1882, a party, who had paid special tax only as a retail dealer, sold to a purchaser in *one transaction* in separate packages 4 gallons of whiskey, 2 gallons of brandy, 2 gallons of blackberry brandy, and 2 gallons of gin. December 8, 1882, he paid the proper collector, under an assessment made in consequence of said sale, \$100 as the special tax of a wholesale dealer for a year and \$50 penalty. The dealer applied to the Commissioner of Internal Revenue for a refund of the amount so paid, and March 17, 1884, the Commissioner allowed the whole claim.

Held:

- (1.) The sale mentioned constituted the vendor a wholesale dealer.
- (2.) The "special tax" year is from May 1, in one year to May 1, in the next year. As the claimant in this case made only one sale as a wholesale dealer, he was not liable to pay the special tax for a year, but only for the residue of the year in which the sale was made—that is, for April, 1882, being \$1.33 with a penalty of \$4.17, in all \$12.50. Having paid \$150, he is entitled to a refund of \$137.50.
- (3.) The sale of a number of articles at the same time, even at separate prices for each, is generally deemed to be entire.

April 21, 1882, John C. Thomasson, who was engaged in business as a retail dealer in distilled spirits, wines and malt liquors at Henderson, Kentucky, sold to William Binley in one transaction in separate packages 4 gallons of whiskey, 2 gallons of brandy, 2 gallons of blackberry brandy, and 2 gallons of gin. For making this sale of *several kinds of spirits* (the aggregate being in excess of 5 gallons) to a customer at one time, Thomasson was required by the collector of his district to pay, and, December 8, 1882, he did pay, a special tax of \$100 as a wholesale dealer, and 50 per cent. penalty, amounting to \$150, under an assessment made by the Commissioner of Internal Revenue. The claimant applied to the Commissioner for a refund of the whole amount so paid. January 12, 1884, the Commissioner of Internal Revenue allowed the claim

for \$141.67, thus holding the claimant as a *wholesale dealer* by virtue of the sale he had made, and allowing him a refund of all the penalty paid, and all the tax paid, except the tax for *one month* as a wholesale dealer—that is for April, 1882.

March 13, 1883, the Commissioner requested the First Comptroller to return the claim for re-examination “under a recent decision of the courts, published since the allowance of the claim, and accepted and acquiesced in by this [Commissioner's] office.” Subsequently the Commissioner of Internal Revenue allowed the claim for \$150.

The First Comptroller is required to decide whether the claim so allowed shall be paid.

DECISION BY WILLIAM LAWRENCE, *First Comptroller.*

The act of February 8, 1875 (18 Stat., 311, sec. 18), as re-enacted in the same words by section 4 of the act of March 1, 1879 (20 Stat., 333), provides:

“That retail dealers in liquors shall pay twenty-five dollars. Every person who sells, or offers for sale, foreign or domestic distilled spirits, wines, or malt liquors, otherwise than as hereinafter provided, in less quantities than five wine gallons *at the same time*, shall be regarded as a retail dealer in liquors. Wholesale liquor dealers shall each pay one hundred dollars. Every person who sells, or offers for sale, foreign or domestic distilled spirits, wines, or malt liquors, otherwise than as hereinafter provided, in quantities of not less than five wine-gallons at the same time, shall be regarded as a wholesale liquor dealer. But no distiller, who has given the required bond, and who sells only distilled spirits of his own production at the place of manufacture in the original packages to which the tax-stamps are affixed, shall be required to pay the special tax of a wholesale liquor-dealer on account of such sales.”

The Revised Statutes provide as follows:

“SEC. 3237. All special taxes shall become due on the first day of May, in each year, or on commencing any trade or business on which such tax is imposed. In the former case the tax shall be reckoned for one year; and in the latter case it shall be reckoned proportionately, from the first day of the month in which the liability to a special tax commenced to the first day of May following.”

Section 3176 of the Revised Statutes authorizes the Commissioner of Internal Revenue to add fifty per centum to said tax in case of any sale by a *party* who has unlawfully failed to make a return for special tax.*

* In this connection the prior legislation on the subject is presented.

The act of July 1, 1862 (12 Stat., 455, sec. 64) provided that:

“3. Wholesale dealers in liquors of any and every description, including distilled spirits, fermented liquors, and wines of all kinds, shall pay one hundred dollars for each license. Every person, other than the distiller, or brewer, who shall sell, or offer for sale, any such liquors or wines in quantities of more than three gallons at one time, to the same purchaser, shall be regarded as a wholesale dealer in liquors within the meaning of this act.

“4. Retail dealers in liquors, including distilled spirits, fermented liquors, and wines of every description, shall pay twenty dollars for each license. Every person who shall sell or offer for sale such liquors in less quantities than three gallons at one

In the "Manual of the Direct and Excise Tax System including the forms and regulations established by the Commissioner of Internal Revenue, the decisions and rulings of the Commissioner," &c., 4th ed., 1864, page 165, under the head of "rulings," is the following:

"No. 95. Any person who shall sell liquors in quantities of more than three gallons at one time and to the same purchaser will be required to take license as a wholesale dealer in liquors, although such sales may not amount to twenty-five thousand dollars per annum. Persons selling liquors at retail, whose annual sales each shall exceed twenty-five thousand dollars will also be required to take license as wholesale dealers in liquors."

This decision was made under the statute declaring that every "person who shall sell * * * liquors * * * in quantities of more than three gallons, *at one time*, to the same purchaser, shall be regarded

time, to the same purchaser, shall be regarded as a retail dealer in liquors under this act. But this shall not authorize any spirits, liquors, wines, or malt liquors to be drank on the premises."

The act of June 30, 1864 (13 Stat., 251, sec. 79) provided that:

"Wholesale dealers in liquors, whose annual sales do not exceed fifty thousand dollars, shall pay fifty dollars for each license; and if exceeding fifty thousand dollars, for every additional one thousand dollars in excess of fifty thousand dollars, one dollar. Every person who shall sell, or offer for sale, any distilled spirits, fermented liquors, or wines of any kind, in quantities of more than three gallons at one time to the same purchaser, or whose annual sales, including sales of other merchandise, shall exceed twenty-five thousand dollars, shall be regarded a wholesale dealer in liquors.

"Retail dealers in liquors shall pay twenty-five dollars for each license. Every person who shall sell or offer for sale foreign or domestic spirits, wines, ale, beer, or other malt liquors in quantities of three gallons or less, or whose annual sales, including all sales of other merchandise, do not exceed twenty-five thousand dollars, shall be regarded as a retail dealer in liquors under this act. But nothing herein contained shall authorize the sale of any spirits, wines, or malt liquors to be drank on the premises."

The act of July 13, 1866 (14 Stat., 116, sec. 9) provided that:

"Wholesale dealers in liquors whose annual sales do not exceed fifty thousand dollars shall pay one hundred dollars and if exceeding fifty thousand dollars, for every additional one thousand dollars in excess of fifty thousand dollars they shall pay one dollar, and such excess shall be assessed and paid in the same manner as required of wholesale dealers. Every person who shall sell or offer for sale any distilled spirits, fermented liquors, or wines of any kind in quantities of more than three gallons at one time to the same purchaser, or whose annual sales, including sales of other merchandise, shall exceed twenty-five thousand dollars, shall be regarded as a wholesale dealer in liquors.

Retail dealers in liquors shall pay twenty-five dollars. Every person who shall sell or offer for sale foreign or domestic spirits, wines, ale, beer, or other malt liquors in quantities of three gallons or less, and whose annual sales, including all sales of other merchandise, do not exceed twenty-five thousand dollars, shall be regarded as a retail dealer in liquors."

The act of March 2, 1867 (14 Stat., 474, sec. 9), struck out of the act of 1866 the words in paragraph four,

"In quantities of more than three gallons at one and the same time to the same purchaser, or"

And in paragraph five,

"In quantities of three gallons or less,"

thus in effect proving that persons who made sales not exceeding twenty-five thousand dollars in a year should be deemed retailers, and those above wholesale dealers.

The act of July 20, 1868 (15 Stat., 150, sec. 59), continued the same distinction, by providing that:

"Wholesale liquor dealers, whose annual sales do not exceed twenty-five thousand dollars, shall pay one hundred dollars; and if exceeding twenty-five thousand dollars,

as a wholesale dealer." The inference from the decision is that a person who sells *at one time* more than three gallons in the aggregate of one or more *different kinds of liquors* was regarded as a wholesale dealer.

September 14, 1869, the Commissioner of Internal Revenue instructed a collector that "the sale of *several* packages of the *same kind* of spirits *at the same time*, each containing less than five proof gallons, but which contain in the aggregate more, cannot be made by a retail dealer, but he may sell several packages of *different* kinds of spirits, each containing less than five proof gallons, although the aggregate may be more. The sale of each different kind is considered as a separate sale." This instruction was given in *answer* to a question whether a retail dealer could lawfully sell to one person "four-and-a-half gallons of *rum* [and] four-and-a-half gallons of *wine* in [separate] wooden packages at one time and place" (10 Int. Rev. Rec., 98, September 25, 1869).

It will be observed that the effect of this opinion was to sanction a sale by a retail dealer to one person at one time and place of two packages each of $4\frac{1}{2}$ gallons, one of *distilled* spirits [rum] and one of *fermented* liquor [wine]. When it was said, therefore, that a retail dealer may sell as stated "several packages of *different kinds* of *spirits*, each containing less than five gallons, although the aggregate may be more," the "*different kinds*" were, one *distilled*, one *fermented*. It was not said that *whiskey* and *brandy* were *different kinds* of spirits, though the language employed might seem to justify this conclusion. On the contrary, when a case was submitted involving the question whether *alcohol* and *gin*, both *distilled spirits*, were to be regarded as *different kinds* of spirits within the meaning of the statute, the opinion was given that they were not. Thus in January, 1875, the Commissioner of Internal Revenue was asked this question: "Can a retail liquor dealer sell $4\frac{1}{2}$ gallons alcohol, $4\frac{1}{2}$ gallons rum, $4\frac{1}{2}$ gallons gin, &c., at the same

shall each pay in addition ten dollars for every one thousand dollars of sales of such spirits, wines, or liquors in excess of twenty-five thousand dollars, and on other sales shall pay as wholesale dealers; and such excess shall be assessed and paid in the same manner as required of wholesale dealers. Every person who sells or offers for sale distilled spirits, wines, or malt liquors, whose annual sales shall exceed twenty-five thousand dollars, shall be regarded as a wholesale liquor dealer. But no distiller or brewer, who has paid his special tax as such, and who sells only distilled spirits or malt liquors of his own production, at the place of manufacture, in the original casks or packages in which they are placed for the purpose of affixing the tax stamps, shall be required to pay the special tax of a wholesale dealer."

The act of April 10, 1869 (16 Stat., 42, sec. 1), provided:

"Retail dealers in liquors shall pay twenty-five dollars. Every person who sells or offers for sale foreign or domestic distilled spirits, wines, or malt liquors, in less quantities than five gallons at the same time, shall be regarded as a retail dealer in liquors.

"Wholesale liquor dealers shall each pay one hundred dollars. Every person who sells or offers for sale foreign or domestic distilled spirits, wines, or malt liquors, in quantities of not less than five gallons at the same time, shall be regarded as a wholesale liquor dealer.

"Dealers in liquors whose sales, including sales of all other merchandise, shall exceed twenty-five thousand dollars, shall each pay an additional tax at the rate of one dollar for every one hundred dollars of sales of liquors in excess of such twenty-five thousand dollars; and on every thousand dollars of sales of other merchandise shall pay at the same rate as a wholesale dealer; and such excess shall be returned, assessed, and paid in the same manner as required of wholesale dealers."

time, without becoming liable to the tax as a wholesale liquor dealer?" January 20, 1875, the Commissioner answered, "that if the retail dealer could show that he made a *separate* bargain and sale with respect to each kind of liquor, he would not be held liable as a wholesale liquor dealer" (21 Int. Rev. Rec., 25, January 25, 1875).

It is understood that the usage in the Treasury Department, at least since the act of February 8, 1875, has been to *regard as a wholesale dealer any person who sells five gallons or more of distilled spirits to one person at the same time and place in one transaction*, although such aggregate amount may consist in part of brandy and in part of whiskey or other distilled spirits, and so of a person selling in the same mode an aggregate of five gallons or more of wine of whatever kinds, and so as to malt liquors of whatever kinds. A learned judge has ruled differently in a recent case, but for several reasons his views cannot be adopted.*

The long usage of the Treasury Department should be regarded as having settled the question. It is well known that in such cases courts, as a general rule adopt the construction given to statutes by executive officers charged with the duty of carrying them into effect when not

*The case is as follows:

United States District Court, Eastern District Michigan, January 14, 1884.

The United States v. William V. James.

A retail dealer in liquors may lawfully sell to the same person at the same time different packages of different liquors, although the aggregate may exceed five gallons, provided no single package equals that amount: otherwise of different packages of the same liquor.

BROWN, J.—Defendant is charged with carrying on the business of a wholesale dealer in liquors without payment of the special tax required by law. His alleged offence consists in selling to the same person at the same time different packages of different liquors—each package containing less than five gallons; but the aggregate purchase considerably exceeding that amount. For instance, a buyer orders of him four gallons each of wine, gin, whiskey, and brandy. He fills the order, putting each kind of liquor into a separate receptacle. The total amount of the purchase is, therefore, sixteen gallons. Does he, by such transactions, become "a person who sells, or offers for sale, foreign or domestic distilled spirits, wines, or malt liquors . . . in quantities of not less than five wine gallons at the same time," as a wholesale liquor dealer is defined by the act of March 1, 1879, chap. 125, sec. 4? In my opinion he does not. I concede that it would be otherwise if he sold like quantities of the same liquor at the same time, though such liquor were put up in different packages. This appears to have been the point decided in *U. S. v. Clare*, 26 Int. Rev. Rec., 101; S. C., 2 Federal Rep., 55, although the facts are not fully stated in the report. In such case it would be almost impossible to escape the inference that the seller intended to evade the law.

But, I think, a sale of different kinds of liquor should be, for the purpose of this act, treated as a separate sale of each kind. The circular of Acting Commissioner Douglass, of September 14, 1869, 10 Int. Rev. Rec., 98, lays down, as it seems to me, the correct principle. It was not within the contemplation of the law to require a fam-

clearly against their meaning (3 Lawrence, Compt. Dec., Intro. xxy, note, citing authorities).

The statute declares that "every person who sells, or offers for sale: (1) distilled *spirits*, (2) *wines*, or (3) malt *liquors* in quantities of not less than five wine gallons at the same time shall be regarded as a wholesale liquor dealer." To sell the spirits, wines, and liquors mentioned "*at the same time*" is, within the meaning of the statute, to sell them at one and the same sale. The statute designates *three kinds* of liquors—no more. It says, in substance, that a person who sells five gallons or more of *distilled spirits* at the same time is a wholesale dealer. If a dealer sells at one time to one person in one transaction $2\frac{1}{2}$ gallons of whiskey, and $2\frac{1}{2}$ gallons of alcohol or brandy, has he not sold five gallons of distilled spirits? There are strong reasons against recognizing as *different kinds* of liquor more than the *three prescribed by the statute*. To say there may be more than three for the purpose now being considered, is to say what Congress has not said. It is to substitute official judgment and discretion for legislative provision. This is forbidden by plain rules of law. "Statutes must rest on the words used—'nothing adding thereto, nothing diminishing'" (Leavenworth, &c., *R. R. Co. v. United States*, 92 U. S., 751). In *Rex v. Burrell* (12 Ad. & Ell., 468), Patterson J. said, "I see the necessity of not importing into

ily grocer or other retail dealer, when he receives an order from a customer for an assortment of wines and liquors, to add together the several items of the order, to see that the aggregate does not exceed five gallons; and, in case it does, to compel him to send his customer to a wholesale dealer, who may, perhaps, decline to sell of any liquor at all a quantity less than five gallons. It is true that such construction may enable a dealer to evade, or, rather, to escape the law; but the same design, probably, exists in ninety-nine cases out of a hundred, where the dealer sells $4\frac{1}{2}$ gallons, or any similar fraction less than five gallons. In each case were it not for the law, he would, probably, sell the full five gallons. But in neither case is the law violated; for we are not at liberty to inquire into the motives of one who does not, in fact, sell the full five gallons. Thus, in Hart's case, 28 Int. Rev. Rec., 226, a dealer received, at different times, seventeen different orders for five gallons of alcohol, and in each case rendered a bill for, and received pay for, five gallons; although in fact, he only put up $4\frac{1}{2}$ gallons. Here was, undoubtedly, not only an intent to evade the law, but a fraud upon his customer; yet, I felt obliged to hold there was neither a sale nor an offer to sell five gallons, and, consequently, no offense. It is evident there must be some latitude permitted in interpreting the law. Thus, if a person should order forty pint mugs of beer for forty of his friends, there would be a sale of five gallons of beer to the same person at the same time, and a violation of the letter, but obviously not of the spirit of the statute. To justify a conviction the offender must have sinned against both the letter and the spirit. This was substantially the ruling of the Supreme Court in *United States v. Isham*, 17 Wall., 496, 506.

In my opinion the defendant in this case ought not to be convicted, and I advise the entry of a *nol. pros.* (30 Int. Rev. Rec., 29 February 4, 1884). January 21, 1884, the honorable Walter Evans, Commissioner of Internal Revenue, transmitted this opinion to the publishers of the Internal Revenue Record, in which it was published, with a letter from him saying: "I fully concur with the court in its views of the law, as therein expressed, and will thank you to publish the opinion, and also this letter in the Internal Revenue Record for the information and guidance of all Internal Revenue officers."

statutes words which are not found there. Such a mode of interpretation only gives occasion to endless difficulty."

A construction which makes more *kinds of liquor* than the statute has designated, might lead to great frauds, and practically defeat the object of the statute in classifying dealers into wholesale and retail. Rye whiskey, wheat whiskey, corn whiskey, are all *species* of the *genus* whiskey. These, in popular parlance, constitute "*different kinds*," but not by statutory classification. From these can be made *four* different combinations, (1) corn and rye, (2) corn and wheat, (3) rye and wheat, and (4) corn, rye, and wheat, which, with the three originals, make seven different varieties of whiskey in all, without reference to other varieties which may be made from other combinations. A sale might be made in separate quantities of a fraction less than five gallons of each of these several varieties of whiskey, and a combination of all might suit the demands of the retail traffic for consumers by the drink, or in small quantities to be carried from the place of purchase. A considerable number of similar combinations may be made of malt liquors, and each yet remain a different variety. There have been skillful combinations which so far misled some officers as to be erroneously regarded as not distilled spirits of any class. (Malakoff Bitters case, 3 Lawrence, Compt. Dec., 129.) The statute clearly settles the question as to *different* kinds of *each* of the three classes of liquors therein designated. It says, "every person who sells *wines* in *quantities* of not less than five wine gallons *at the same time* shall be regarded as a wholesale liquor dealer." The same *plural* form of expression is used as to "*malt liquors*." The sale of five gallons of *wines*, of *one* or many *kinds*, makes the seller a wholesale dealer—so of malt liquors—so of distilled spirits. It must be assumed that Congress had some purpose in using this plural form of expression, and the statute must be so construed as to give effect, if practicable, to every word used, and to the peculiar forms of phraseology adopted. If Congress had designed to permit a sale of many different *varieties* of wines in separate packages of less than five gallons each, but aggregating more, without payment of a special tax as wholesale dealer, it is reasonable to infer that the law would not have used the word "*wines*," but would have said "every person who sells in quantities of not less than five gallons, of any *one kind* of wine, malt liquor, or distilled spirits at the same time, shall be regarded as a wholesale liquor dealer." But no such, nor any equivalent form of, expression is used. And the *purpose* of the *plural form* of expression which Congress did use is sufficiently manifest. The law intended to recognize the retail traffic as one designed to meet the demands of consumers, to drink at the place where sold, distilled spirits, wines, and malt liquors, and the ordinary purchases in small quantities to be carried away for private use. Any other construction would practically enable a retail dealer supplied with *many varieties* of distilled spirits, wines and malt liquors, to supply other retail dealers with stocks for retail trade. Thus a dealer with a barrel each of corn, rye and wheat

whiskey, could sell from them seven packages of $4\frac{1}{2}$ gallons each or in all $34\frac{1}{2}$ gallons—that is, a package of $4\frac{1}{2}$ gallons, each of (1) corn whiskey, (2) rye, (3) wheat, (4) corn, and rye, (5) corn and wheat, (6) rye and wheat, and (7) corn, rye and wheat. This operation could be repeated every day in the year, and thus practically a wholesale trade be conducted on payment of the special tax of a retailer. Similar combinations of wines and malt liquors could be made with similar results. Such “effects and consequences” of a construction of the statute are proper subjects of consideration in ascertaining the purpose of Congress. The definition of a *retail* and of a *wholesale* dealer given by the statute confirms the construction already given to the statute. Its language is “every person who sells or offers for sale (1) distilled spirits, (2) wines, or (3) malt liquors, in less quantities than five wine gallons at the same time, shall be regarded as a retail dealer in liquors.” The word *quantities* is in the plural, and the effect is that a person who, in two or more different packages, or “quantities,” sells at the same time five or more gallons of either (1) distilled spirits, or (2) wines, or (3) malt liquors, of any kind of either is not a retail dealer. And the statute also says that “every person who sells (1) distilled spirits, (2) wines, or (3) malt liquors, in quantities of not less than five wine gallons at the same time, shall be regarded as a wholesale liquor dealer.” The plain meaning is, that a person who sells five or more gallons though in separate packages or quantities either (1) of any kind or kinds of wines, or (2) of any kind or kinds of malt liquors, or (3) of any kind or kinds of distilled spirits, is a wholesale dealer. It must be apparent that if more kinds of liquors be recognized than the statute has named, it will be impracticable fairly to administer the internal revenue laws on this subject. It would require more than attainable scientific skill, and would tax the practical testing power of revenue officers beyond their capacity, to ascertain the different kinds of spirits, even if dealers should be found willing to allow this latter mode of judging. It would become a necessary qualification of a collector, or of any other officer charged with the duty of executing the law, that he should be “a good judge of liquors,” and possess an extensive capacity to “sample” it in all doubtful cases. A construction of the statute which encumbers its execution with these and other difficulties that might be mentioned cannot be adopted.

It may be possible that on a given day or even hour a party may purchase of a dealer by *distinct* and *separate* sales (1) four gallons of alcohol, (2) four gallons of brandy (3) and four gallons of whiskey, in which case the vendor would not be a wholesale dealer. But, as a general rule, the sale of a number of articles at the same time, even at separate prices for each, is deemed to be an entire sale. Thus, it is said in *Gilman & Sanborn v. Hill* (36 N. H., 318),

“If the sale be of a number of articles at the same time, neither of which is of the price of \$33, but which in gross exceed that sum, the contract is deemed to be entire, and to fall within the statute” (*Balder v. Parker*, 2 Barn. & Cress., 37; *Comyn on Contracts*, 85).

As a general rule the First Comptroller must necessarily exercise his own judgment on all questions of law submitted for his decision. But the administration of the internal-revenue laws is in many respects entrusted to the judgment of the Commissioner of Internal Revenue. If he adopts a construction of the statute as to what constitutes a wholesale or retail dealer, taxes will be assessed and collected accordingly. No head of any other bureau can direct him concerning the mode of assessing and collecting. And justice requires that the laws shall be executed uniformly upon all tax payers and dealers. Whatever rule may be finally adopted by the Commissioner will be duly considered by the Comptroller with a view to ascertain to what extent it should be carried into effect in this office. It may sometimes be proper in the *quasi judicial administration* of the office of the Comptroller to follow the same rules adopted in the executive administration of other bureaus.

The sale in this case was made April 21, 1882. The "special tax year" is from May 1st in one year to May 1st in the next year (Rev. Stat., 3237). The claimant made only one sale as a wholesale dealer. The statute provides that a dealer who commences business after the "special tax year" has commenced shall pay tax at the rate of \$100 a year "proportionately, from the first day of the month in which the liability to a special tax commenced to the first day of May following" (Rev. Stat., 3237). In this case the claimant should have paid for the month of April, 1882, \$8.33, and a penalty of \$4.17, in all \$12.50, instead of which he did pay \$150.00, and he is hence entitled to a refund of \$137.50, which will be allowed and no more.

TREASURY DEPARTMENT,

First Comptroller's Office, April 14, 1884.

IN THE MATTER OF THE RIGHT OF THE FINDER OF A COUPON BOND OF THE UNITED STATES WHO HAS PRESENTED IT TO THE TREASURY DEPARTMENT FOR PAYMENT, TO RECEIVE EITHER (1) PAYMENT THEREOF OR, (2) IN CASE OF NON-PAYMENT, THE BOND ITSELF.—LOST BOND CASE.

1. The finder of a coupon bond of the United States who presents it to the Treasury Department for payment, is entitled neither to payment nor to the return of the bond.

August 20, 1880, the Fidelity Insurance Trust and Safe Deposit Company, of Philadelphia, transmitted to the Treasurer of the United States certain United States coupon bonds, with a letter describing them and saying:

"In the course of our business it happens that through the carelessness of our patrons, securities or valuables are found in our office, mislaid or lost. Among these are the following, viz:

"U. S. 5 per cent. cons. coupon bond No. 31359, dated July 1, 1868, \$100. Coupons of January 1, 1869, and subsequent dates, attached.

"U. S. coupon bond 6 per cent. loan, July-August, 1861, No. 4225. \$50. Coupons, July 1, 1869, and subsequent dates, attached.

"We have been unsuccessful in our attempts to find owners for the above, and I now take the liberty of referring the matter to your office, in the hope that some caveats may have [been] filed in reference to them. If so, I will thank you to inform me."

April 22, 1864, R. Patterson, secretary of said Fidelity Insurance Trust and Safe Deposit Company, transmitted to the Secretary of the Treasury two of said bonds numbered 4225 and 31359 and coupons attached, with a letter saying they were inclosed for redemption, and adding "for which please remit principal and overdue interest." They were respectively indorsed as follows: "Pay to the Secretary of the Treasury for redemption. R. Patterson, Treasurer the Fidelity Insurance Trust and Safe Deposit Company, Philadelphia, April 22, 1884." April 24, 1884, the secretary of the company, in another letter to the Secretary of the Treasury, in relation to said last-named bonds, said:

"The bonds are payable to bearer, and * * * we understand the finder of such an instrument is entitled to claim it, with every incident of ownership against all the world except the loser * * *. We are entitled to payment. * * * Our object in collecting the amount is to hold the same in a special fund to be set apart for the original owners if ever found."

These letters having been referred to the First Comptroller, he advised the Secretary of the Treasury that the claimant "occupies simply the position of a finder, and as such has no lawful right to demand payment."

May 7, 1884, the President of the claimant corporation, having been notified of this action, addressed a letter to the Secretary of the Treasury, in which, referring to it, he says:

"We respectfully but most confidently deny both the justice and the legality of this decision, and we hereby demand the return of the bonds to us. We deny the right of the officers of the Government either to stamp or retain these bonds. Though we may not be able to collect by law from a sovereign power, yet we think we have a legal remedy in case an official under color of his office retains property, of which we have a lawful custody.

We have read the opinion in the 'Lost Greenback case,' referred to (3 Lawrence, Compt. Dec., 166), and fail to see its applicability or authority as applied to this matter. We beg to say:

I. That the finder of a lost chattel is entitled to it as against all the world but the owner who has lost it. This is universally conceded. It is 'horn book law.' All the text books so declare, and we believe no court has ever decided otherwise.

1 Black. Com., 296; 2 *Id.*, 9; 2 Kent Com., 290; See cases cited in Bouvier's Law Dict., title 'Finder.' Also *Bridges v. Hawkesworth*, 7 E. Law & Eq., 424, case of lost bank notes; *Matthews v. Harsell*, 1 E. D. Smith, 393, case of Texas notes.

Hamaker v. Blanchard, 9 Norris, S. Ct. Penna., 377. This was a case in the Supreme Court of this State, where the things lost were 3 twenty-dollar bank notes, and it was held that the finder was entitled to them.

And so in *Tatum v. Sharpless*, 6 Philada. 18, where it was held that the finder of lost U. S. Treasury notes was entitled to them.

There can be no question that except as against our customers who left the bonds here, this company is the owner of them.

II. The remedy of the losers of the bonds is against, and only against, this company, whose officials found them here, after their customers had departed. They have no recourse against the Government. The case of a destroyed bond does not apply, for these bonds exist. We notified you in 1880 that we held them, so that there could be no double recovery, and in the hope by such notice to ascertain which of our patrons had left them. If the losers of the bonds should establish their claim as owners of the bonds, and demand them of us it might be no protection to us if we should state that we had sent them to your Department for redemption, and that you refused to return them.

III. To make the contention of your Department good, it would have to be established as law that when a negotiable note or bond is lost, the debtor is discharged from its payment, and is entitled to wrest it from the hands of the finder, and that if the circulating notes of the United States or of any bank are lost, the Government, or the bank, is absolved from their redemption, and is authorized to take them away from the finder and stamp or cancel them.

This company is responsible to those that deal with it. Its responsibility is ample to protect their rights, and since the Government refuses to redeem these bonds, we desire respectfully to insist upon their return to us, that we may be ready to deliver them to the party who left them here, whenever due proof is made.

We make this demand for the return of the bonds, as we think we cannot compel more, and without at all admitting the right of the Government to refuse payment to us, which, we think, to be purely arbitrary."

May 8, 1884, this letter was referred to the First Comptroller "for consideration and report." Under "calls" for payment, bond No. 31359 matured July 4, 1879, and No. 4225, July 1, 1881. These bonds are payable to bearer.

OPINION BY WILLIAM LAWRENCE, *First Comptroller*.

The First Comptroller is required by law to settle the accounts of the Treasurer of the United States, and hence must *decide* upon the legality of all payments made by him, including Government bonds. Hence it is usual and proper that his opinion be taken upon all questions which arise as preliminary to the rightful payment of all obligations of the United States. It is in view of this, that the question is now submitted for an opinion—whether the claimant corporation is entitled to the return of the bonds now under consideration.

It is now well understood that there is a system of *national executive common law*, which, like the judicial common law of England, and of most of our States, adapts itself to conditions and circumstances, and is in constant process of development and growth (3 Lawrence, *Compt. Dec.* XXII, and authorities cited; Keyser's case, 4 *Id.*, 292). And it has been shown that "the executive national common law is frequently *different* from that system of common law which prevails in courts even

on similar questions." "The difference rests on conditions [reasons] and circumstances which fully justify it" (*Id.*, citing authorities). In other words, the rules of law applicable to *private persons* are not necessarily adapted to the Government in the performance of its obligations, and in its relations to private persons. Hence, the question now to be decided must be determined on principles of national executive common law. This, like all common law, rests on reason. Law is the perfection of reason. The purpose of all common law is to secure *justice*. The real question, then, is, what does justice require? What does reason sanction? Reason furnishes the foundations of justice; and this is common law. It may be regarded as settled law that, in the absence of any statute or permanent usage on the subject, the finder of a coupon or other bond of the United States has no such right thereto "as will enable him to maintain an action for the money" (*McLaughlin v. Waite*, 5 Wend., 404; *Sallu's case*, 1 Lawrence, Compt. Dec., 2d ed., 239; *Lost Greenback case*, 3 *Id.*, 166). In some States the right to lost goods, money, &c., is regulated by statute (2 Kent, Com., 356, *n*). It is not alleged that there is any statute applicable in this case. Hence, no question can arise as to how far any State statute may, by construction, or can, under the Constitution or acts of Congress, affect any right in this case. The owner of a *lost* coupon or registered bond, or even of one destroyed, may maintain an action thereon (*Buffalo Bayou case*, 16 Ct. Cl., 239; *Lost Greenback case*, 3 Lawrence, Compt. Dec., 169, and authorities cited). And if the *owner* has thus a right of action, the finder can have no legal claim to receive payment. Some of the authorities on this subject will be presented. They show, conclusively, that the finder is not entitled to demand payment of a bank bill, negotiable security, or any chose in action.

It is a settled rule of the law merchant that one not the owner, even the thief, may make a valid transfer of negotiable instruments, if they are in the usual state in which they commonly pass on delivery from man to man, like coin, according to the usage of trade; provided the buyer has been guilty of no fraud in taking them, for in that case, he would be forced to bear the loss (*Benjamin, Sales*, 4th Am. ed., § 15, and cases cited). It is also a well-settled rule of the law merchant that the robber or finder of such a negotiable instrument can acquire no title against the real owner, nor can his transferee, *with notice of the loss* (2 Dan. Neg. Instrs., § 1469 and cases cited).

Not only does he or his transferee, with notice, acquire no right to enforce payment of such instrument of any party to it bound to pay, but the loser may at once hold him liable in an action of *trover*, or *assumpsit*, or for money had and received (*Clark v. Shea*, 1 Cowp., 197; *Smith v. Braine*, 16 Q. B., 244; *Mason v. Waite*, 17 Mass., 560; *Henderson v. Irby*, 1 Speers, 43; 2 Dan. Neg. Instrs., § 1469). And the party paying, knowing the circumstances, would be liable to an action by the owner (*McLaughlin v. Waite*, 5 Wend., 404; 2 Kent, Com., 12th

ed., 357, *note*; 1 Edwards, Bills, 3d ed., § 434; Lovell v. Martin, 4 Taunt., 799).

Thus, whilst in regard to bank notes, and in most respects to other bills and notes transferable by delivery, the title and possession are considered inseparable, yet it being shown or admitted that the party is in possession of a negotiable instrument, which was lost, or was stolen from the true owner, he cannot recover upon it, unless he assumes the burden of proving not only that he gave valuable consideration for it, but that he took the paper in good faith in the ordinary course of business (Rees v. Marquis of Headfort, 2 Campb., 574; Saunders, Pleading and Evidence, 5th Am. ed., 628; Mills v. Barber, 1 M. & W., 425; 9 B. & C., 208; Stalker v. McDonald, 6 Hill, 93; 1 Edwards, Bills, 3d ed., § 438). This, of course, the finder or his bailee cannot do. Some additional authorities will be cited hereafter which support the principles above stated.

Thus it is clear that if the Government should pay the finder, knowing him to be such, it would be bound to pay the true owner when he should appear. He could not against his consent be turned over to a remedy against the finder. If it should be held that after such payment to the finder, the sole remedy of the real owner of the bond was against the finder, it would be unavailing in case of insolvency, and would, in such case, and by death of the finder, and under many other conditions be generally equivalent to a denial of all relief. The conclusion is irresistible that the claimant in this case has no right to payment of the bond. It may be conceded that as between private persons, the finder of a Government bond would generally have a right to its *custody* against all the world except the rightful owner (2 Kent, Com., 356; 2 Schouler, Personal Property, 14; Bridges v. Hawkesworth, 7 E. L. & Eq., 424; Merry v. Green, 7 M. & W., 623; McAvoy v. Medina, 11 Allen, 548; Lawrence v. State, 1 Humph., 228; Kincaid v. Eaton, 98 Mass., 139). The general rule, as between private persons, is, that the finder of a chattel has a right to its possession when the owner is unknown.

When *movables*—tangibilities—are found upon the *surface* of the earth, and are *unclaimed by any owner*, they are supposed to be abandoned by the last proprietor, and as such are returned into the common mass of things, and therefore they belong, as in a state of nature, to the first occupant or fortunate finder, unless at common law they fall within the description of waifs, hidden treasure, goods derelict at sea, estrays, or wrecks (2 Bl. Com., 402).

If the owner is unknown, the finder acquires by occupancy a right better than that of any body else, except the rightful owner; a title which he may assert by action against *any one* besides the true owner (2 Kent, Com., 12 ed., 356; Armory v. Delamirie, 1 Str., 505; Binstead v. Buck, 2 Wm. Bl., 1117; Nicholson v Chapman, 2 H. Bl., 253; Armory v. Flynn, 10 Johns., N. Y., 102; Taucil v Seaton, 28 Grat., 603, 604). This rule

of law is clear and undisputed. And, to a certain extent, the same rule has been applied to choses in action. The *place* in which a lost article is found does not constitute any exception to this rule. Thus it has been held, that one who picks up a parcel of bank notes from the floor of another's shop, may recover them from the shopkeeper to whom he entrusted them for the owner, the owner not being found (*Bridges v. Hawkesworth*, 7 E. L. & Eq., 424); that the conductor of a railroad car is entitled, as against the railroad company, his employers, to money found by him in the car, no owner having appeared to claim the same after advertisement had been made (*Tatum v. Sharpless*, 6 Phila., 18); that a bailee of a safe who finds money therein between the lining and outer casing, can assert title to it against the owner of the safe who had bought it without knowledge of the money being contained therein (*Durfee v. Jones*, 11 R. I. 588; s. c., 23 Am. Rep., 528 and *note*); that an employé in a paper manufactory, who, while engaged in assorting a bale of old papers purchased by the proprietor for manufacture, found certain lost genuine bank bills enclosed in a clean, unmarked, and undirected envelope, which had formed part of such bale, and who delivered them to the proprietor to ascertain if they were genuine, by whom they were retained, could recover their value from such employer in an action brought for that purpose (*Bowen et al. v. Sullivan*, 62 Ind., 281).

In the elaborate case of *Brandon v. Planters and Merchants' Bank of Huntsville* (1 Stewart, 320), it was held that lost property found by a slave belonged to his master, but there is probably no case to which that doctrine has been applied as between employer and employé.

To fall within the rule, it is necessary that the chattels appear to be really lost, and not merely laid down and forgotten (*State v. McCann*, 19 Mo. 249; *Lawrence v. The State*, 1 Humph. 228; *McAvoy v. Medina*, 11 Allen, 549).

Armory v. Delamirie, *supra*, is the leading case in reference to the finder's title to lost chattels, and since its decision there has been no serious questioning of the rule of law mentioned above.

But whilst the principles of law on this subject are clear, there has been some difference of opinion concerning the application of them.

It seems necessary to investigate the limitations which have by some been imposed upon the rule; for, while it is universally conceded that the doctrine of *Armory v. Delamirie* extends to all personal chattels of a tangible nature, it is sometimes contended that it is not applicable to negotiable securities. (*McLaughlin v. Waite*, 9 Cowen, 670; s. c., 5 Wend. 404; *Tancil v. Seaton*, 28 Grat., 604.) The rule certainly applies to money found, because it has been held that it applies to bank notes, which pass as money (*Miller v. Race*, 1 Burr., 452, 457; *Bridges v. Hawkesworth*, 7 Eng. L. & Eq., 424; *Tancil v. Seaton*, 28 Grat., 604 *et seq.*; *Durfee v. Jones*, 11 R. I., 588; *Bowen et al. v. Sullivan*, 62 Ind., 281; *Tatum v. Sharpless*, 6 Phila., 18).

Lord Mansfield, in *Miller v. Race*, *supra*, extended the rule to bank notes, because they were "looked on as money," though not so in the strict sense. This case established the doctrine, now universally entertained, that bank notes are negotiable like money, pass from hand to hand by delivery, possession itself being sufficient evidence of title (2 Dan. Neg. Instrs., § 1674).

A finder of a bank note, though having no title against the owner, "has such a possessory interest in it as to enable him to recover it from a depositary to whom he has confided its care, in the absence of any claim by the rightful owner" (2 Dan. Neg. Instrs., § 1674; *Durfee v. Jones*, 11 R. I., 588; *Tatum v. Sharpless*, 6 Phila., 18; *Tancil v. Seaton*, 28 Grat., 603; *Bridges v. Hawkesworth*, 7 E. L. & Eq., 424). It is difficult to see how bank bills may be within the rule and commercial paper not be, for Lord Mansfield at an early period, with far-reaching sagacity, put them all upon the same basis. In *Miller v. Race*, *supra*, he held that there was no difference in principle between bank notes and money, and in *Grant v. Vaughn*, 3 Burr., 1525, that there was no distinction between bank notes and any other commercial paper.

At this day all negotiable instruments are, before maturity, considered as having a circulating credit like the currency of the country (*Overton v. Tyler*, 3 Barr., 346; 1 Dan. Neg. Instrs., § 1). It has been said of them that "possession and title are one and inseparable" (*Murray v. Lardner*, 2 Wall., 110; 2 Dan. Neg. Instrs., § 1503). When payable to bearer or indorsed in blank, they may be transferred by delivery simply, otherwise by indorsement, and what is transferred is the *legal title to the instrument itself*, and the whole amount of money expressed upon its face (1 Dan. Neg. Instrs., § 1).

It has been held, however, that the finder of an instrument by which a debt or other chose in action is evidenced, does not ordinarily acquire any interest in *the chose itself*, or in the contract in which it originated (*Biddle v. Bayard*, 1 Harris, Pa. St., 150). In this case Gibson C. J., said, "It is not pretended that a finder of a bill or note payable to bearer, could transfer the ownership of it, unless there had been culpable carelessness on the part of the loser. It is not easy to determine what would be such; but the bare fact of loss would not be evidence of it."

In a note to *Armory v. Delamirie* reported in 1 Smith's Leading Cases (487), it is said in reference to *Biddle v. Bayard*, *supra*: "It is, therefore, doubtful whether he [the finder] can maintain trover or replevin against a third person by whom it is wrongfully detained or taken." *McLaughlin v. Waite* (9 Cowen, 670), which was affirmed with much dissension in 5 Wend., 404, is a somewhat similar case. The finder of a lottery ticket, which had drawn a prize, delivered it for safe-keeping to the defendant, who received the amount of the prize and refused to pay it over. It was held, under these circumstances, that an action for money had and received would not lie, and much doubt was expressed whether

the plaintiff could recover in trover. The grounds taken by the court were, that finding the ticket did not give the plaintiff an interest in the contract of which it was the evidence, and, that the ticket itself was a mere incident to the contract. Mr. Smith says of this decision (1 Smith's Leading Cases, 487), that it "seems to have been influenced by the fact that the defendant was the broker by whom the ticket had been sold, and had given security to the proprietors of the lottery for its payment to the proper person; and it was said with great force, that whether the ticket was or was not negotiable, a payment to the finder with notice that he was not a holder for value, would not be good as against the purchaser. The question before the court in this instance, was, therefore, different from that which would arise if an action for trover were brought for a bank note or other instrument payable to bearer, and tortiously taken or withheld from the finder, which would, no doubt, entitle him to an action against the wrongdoer."

In *Tancil v. Seaton* (28 Grat., 601), the reasoning of the distinguished chancellor (Walworth) in *McLaughlin v. Waite* is considered "somewhat subtle and not very satisfactory," and opposed to the reasoning in *Bridges v. Hawkesworth*, 7 E. L. & Eq., 424. This was a most interesting case, in which a bank bill was found and deposited with defendant for the purpose of ascertaining its genuineness. He deposited it in his safe, which a few days afterwards was forced open, and the note stolen. Suit was brought, and plaintiff's recovery was resisted on the ground that his title, acquired by the finding, which was communicated to the defendant at the time the note was delivered to him, was not sufficient to support the action. It was held that, even if the conclusion reached in *McLaughlin v. Waite* was correct, negotiable paper, payable to the holder, is not within the operation of the general rule relative to the title of the finder of lost chattels, yet that bank notes convertible at par into money are within it, and in support of this are cited *Miller v. Race*, 1 Bur., 452, 457; *Bridges v. Hawkesworth*, 7 E. L. & Eq., 424, and as suggestive, though not in point, *N. Y. & Harlem R. R. Co. v. Haws*, 56 N. Y., 175, and it was further held that no court of justice should tolerate a bailee in such a case to withhold the note from the finder, and to appropriate it to his own use in case the owner never appeared.

In *Lowremore v. Berry* (19 Ala., 130), it was held that the plaintiff could recover in an action of trover, upon proof of his prior possession of a promissory note, notwithstanding the legal title to it and the right to sue for the money due thereby are shown to be in another person. And this was indeed established by *Upchard v. Tatam*, 3 Cro. (Jac.) 637, where trover was allowed for a bond alleged to have been converted by the defendant to his own use (4 Minor, Institutes, 452). It seems firmly established that trover lies against a bailee who tortiously converts a negotiable instrument, and even against the maker or drawee who wrongfully seizes or detains the note or bill (*Bleaden v. Charles*,

7 Bing. 246; *Marston v. Allen*, 8 M. & W. 494; *Garlock v. Geortner*, 7 Wend. 198; *Knight & Legh.*, 4 Bing. 589; *De la Chaumette v. Bank of England*, 9 B. & C. 208; *Reynolds v. French*, 8 Vt., 85; *Lamb v. Moberly*, 3 T. B. Mouroe, 179; 2 Dan. Neg. Instrs., § 1468).

The question which is now presented for consideration is not whether the United States can maintain replevin against the finder of a bond to recover its possession or trover to recover its value. But it is, *whether a finder, who presents it to the Treasury Department, unlawfully demanding payment without a right thereto, can lawfully demand its return*, or whether, in such case, *it is the legal right and duty of the Government to retain it for the lawful purpose of paying it to the rightful owner*, and thus to perform its obligation to make payment, and not defeat this duty by surrendering the bonds to a claimant having no right to payment.

1. The right of the Government so to retain bonds is settled by long usage.

The universal practice is, and always has been, for the Treasury Department to retain for the lawful purpose of paying the rightful owner all registered bonds presented for payment or transfer by a party having no right to either. This rule has been applied when the party thus presenting a bond has not been guilty of fraud or bad faith, and, *a fortiori*, it should be applied in those cases when he has, though in this particular case the good faith of the claimant is undoubted. Thus, if a party has in good faith purchased a registered bond on a forged assignment, and presents it for transfer, it is never returned to him, but is held for the rightful owner. The same rule must, in all reason and justice, be applied to coupon bonds when presented by a finder or by a person who has fraudulently obtained them. And this is now, as it has generally been, the usage as to coupon bonds.

2. This usage is founded on duty, policy, and justice. It is supported by solid reasons. In the mode stated, the Government holds itself out to the world as the *universal bailee*, ready at all times to take the custody of every lost bond and every bond the title to which is disputed. This duty arises under the statutes imposing an obligation on the Government to make payment and providing the mode of doing so. It is an incident of the powers given to officers on this subject. It is a part of the moral obligation of the Nation to protect its creditors in the full enjoyment of their rights, and neither to do nor permit to be done anything which could delay, obstruct, or prevent performance of the duty to pay bonds at maturity. No private finder of such bond is charged by law with any such universal duty. It is well that this is so. The Government, as bailee, can always be found. It is always accessible. Its place of business is known to all the world. Its files and records are preserved in vaults, which furnish protection against loss or destruction more safe and certain than that afforded by any private citizen or corporation. If the Government, once having received the custody of a lost bond, should return it to the finder, however honest, his place of

residence may be unknown, or if known may change; he cannot so safely preserve it as can the Government; he must die sooner or later, and then it must pass into the hands of others who may be untrustworthy, or who may be negligent in the means of preserving it. The officers of private corporations change, corporations are liable to fail, to be dissolved, and to perish even from the memory of man. The Government can never use the custody of such bond to impose on innocent purchasers; a private citizen or corporation may.

If the finder of a promissory note should present it to the maker for payment, the latter would not be under any legal obligation to pay it, but he would have no right to retain its custody. This must be, for manifest reasons. The possession of it by the debtor would raise a presumption of payment, and thus embarrass the rightful owner whenever he might appear. The possession by the debtor would enable him to destroy the evidence of his debt, and thus do a wrong to the rightful owner. And on well settled principles, the finder is the bailee of the rightful owner, charged with the duty of preserving it for the protection of the rightful owner. A finder is not *bound* to take the custody of a lost note, but if he do so, he voluntarily assumes the duties of a bailee (2 Schouler, Personal Property, 15; 2 Kent, Com., 356).

But these principles are wholly inapplicable, when the finder of a Government bond presents it to the Treasury Department for payment. The law, in theory at least, attributes to the Government absolute impeccability. The law commands what is legally right. "The king can do no wrong," is a maxim of the common law. The Government is immortal, and in doing what the law authorizes can do no legal wrong. Man, in his present state, is mortal, and sometimes "prone to evil" and "born unto trouble as the sparks fly upward." If the finder of a lost bond present it to the Treasury Department, the possession of it by the officers of the Department raises no legal presumption of payment. The law presumes, and the fact is, that such record will be kept of it as will protect the rights of the real owner. The usage as to the bonds now in question, and as to all bonds presented for payment, or for the issue of a duplicate as to which there is a question of controverted ownership is to stamp them thus: "Treasury Department, Office of the Secretary, April 22, 1884. Held for decision of ownership,"* and a proper record is made to protect the rights of claimants. In legal contemplation, the possession of such bond by the Government involves no danger of its destruction or other act to the prejudice of the rightful owner. He is protected by the stamp and record to which reference has been made. Thus the highest guaranty is given that the rights of the real owner will be protected. The Government keeps a record of its public debt open to the inspection of every person interested. The finder of bonds may or may not keep such a record. He has no interest

* This stamp was procured at the instance of the present First Comptroller to be applied to all such bonds.

in doing so, and if he do so, it is not open to the inspection of private claimants; and the legal means for obtaining information, or of securing inspection may be difficult if not doubtful. The Government, in its statement of the public debt, periodically published, makes known the amount of matured and unpaid public securities.

It is the duty and the interest of the Government to ascertain and pay the owners of lost bonds. If it even should be the interest of the finder of such bonds to ascertain the owner, no law has provided any means of enforcing the duty to do so. The Government has a well-defined duty in becoming the custodian of lost bonds, the purpose of its custody is reasonable, necessary, and just. The purpose of a finder in demanding the custody to the exclusion of the Government may be honest (as it undoubtedly is in this case), but in other cases it might be otherwise, and, as a general rule, it can be supported by no sufficient reason, and may be employed as a means of oppression and injustice. The Government becomes a bailee without charge to the owner, the finder may employ his custody as a means of securing a reward which would be a burden on the real owner. (2 Schouler, Personal Property, 15; 1 *Id.*, 488; 2 Kent, 636; *Nicholson v. Chapman*, 2 H., Bl. 254; *Wentworth v. Day*, 3 Metc., 352; *Marvin v. Treat.*, 37 Conn., 96.) The public credit will be improved by maintaining the right and duty of the Government to act as custodian, and thus public policy, good morals and the rights of the owners of bonds be promoted.

A learned author in referring to "goods *unclaimed* in the hands of some trustee or bailee, deposits in a bank * * * where, as often happens, the rightful owner or creditor is not aware of his rights," says:

"It may be, in such a case, that the owner is in ignorance of his rights, and would still assert his rights should any notice reach him; or it may be he has died.

The usual consequence is that the party who should have handed over the goods, or paid the debt, enjoys ownership and dominion without the trouble of making a discovery; and, profiting by time and secrecy, he may come at last to own that which he really owed. Over all property of this sort, the State, as trustee for the true owner, should one be found, otherwise on behalf of the public, may properly assume control, and that legislation reaches in this direction is apparent by reference to recent acts in some of the United States, which require certain corporations to publish regular lists of unclaimed dividends and deposits; also causing goods transported by common carriers, which remain unclaimed after a certain period to be advertised and sold at auction, the proceeds, after the payment of all expenses and charges, to be turned over to the public treasury" (Schouler, Personal Property, 26).

If no owner can be found, it is much more reasonable and just that the whole tax-paying public should have the benefit of the non-payment of a lost bond than that a mere accidental finder should receive from the treasury money for which he has given no equivalent.

And it has been said:

"The tendency of our modern jurisprudence is clearly to take from the individual all title to goods abandoned, lost, and stolen,—to all

chattels, in fact, which appear to have no owner,—and to vest the privileges, present and prospective, of a finder, in the State; no longer the State as personified in a monarch who grasps at the property for the personal gratification of himself and his favorites, but the State in the generous and enlightened sense of the public,—*the whole people*. This modern idea is theoretically just; just, too, in practice, *where the expenses of securing the property can be kept down*. Policy, and the claims of order and tranquillity, afforded the early justification for public interference with individual occupancy; to this should now be added, the desire *to enrich a whole community in preference to single members*. But the chief glory of our modern occupancy legislation appears in the humane and *just regard which is paid to the dispossessed owner who has never intended abandoning his fundamental rights*. Some of the old feudal expedients, such as a brief prescription for clinching a thief's title, and confiscation, whereby the king himself became by substitution a robber of the goods for which his subject had swung, have not stood the modern tests. *The true owner has now, and always should have had, a fair chance to regain that which had passed from him without his consent*; not even the careless *bona fide* purchaser standing quite as securely as of old. *Whenever the State lays hold of the vacant goods, it is, as the drift of American legislation plainly indicates, not only with the intent of subjecting it to the demands of the true owner, whoever he may be, but likewise instituting a proper search for him*; the chattel, or its proceeds, finally reverting to the public, in most instances, by a title paramount, indeed, to that of the private occupant, but only perfect as to the former owner, when it becomes reasonably certain that no one exists to claim on his behalf, or there has been a delinquency in asserting his right tantamount to utter abandonment of title" (2 Schouler, Personal Property, 27).

Thus, upon any view that can be taken of the claim made in this case, it is confidently believed that it cannot be supported by law, reason, or justice.

The Secretary of the Treasury will be advised to retain the bonds.*

TREASURY DEPARTMENT,

First Comptroller's Office, May 14, 1884.

*May 23d, 1884, the Hon. Charles J. Folger, Secretary of the Treasury, addressed a letter to the president of the Fidelity Insurance, Trust, and Safe Deposit Company, in which he said:

"I have to inform you that the question whether the Government can consistently with its obligations to pay its bonds to the owners thereof return the bonds in question to you has been submitted to the First Comptroller of the Treasury for his opinion. He has rendered the same, in which he concludes that it is the right and the duty of this Department to retain the custody of these securities until payment is demanded by the rightful owner. In this conclusion I concur."

The Hon. Secretary then copies at considerable length portions of the opinion of the Comptroller, and concludes his letter as follows:

"In accordance with the recommendation of the First Comptroller the bonds have been stamped, and are held awaiting proof and decision of ownership."

IN THE MATTER OF THE RIGHT OF A CONTRACTOR, WHO HAS CONSTRUCTED NEW WORKS, AND KEPT THEM IN REPAIR FOR FIVE YEARS UNDER THE ACT OF JUNE 11, 1878 (20 STAT., 106), "PROVIDING A PERMANENT FORM OF GOVERNMENT FOR THE DISTRICT OF COLUMBIA," TO RECEIVE THE UNITED STATES OR DISTRICT OF COLUMBIA BONDS IN WHICH THE TEN PER CENTUM GUARANTEE-FUND RETAINED UNDER SAID ACT HAS BEEN INVESTED.—GUARANTEE-FUND CASE.

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1. Under the act of June 11, 1878 (20 Stat., 106), the Commissioners of the District of Columbia have the sole authority to invest the ten *per centum* guarantee-fund retained under said act in the public securities thereby required.
 2. The Commissioners are also charged by law with the duty of making such final disposition of this fund as the statute authorizes.
 3. The legality of such disposition is made by statute subject to review by the First Comptroller, who must, thus, decide whether a contractor is entitled to receive the *bonds* in which the guarantee-fund has been invested, or to be paid in *money*.
 4. A contractor under the act of June 11, 1878 (20 Stat., 106), who has complied with the conditions of his contract, is to be paid in *money*, from the proceeds of the sale of the guarantee-fund-bonds, ten *per centum* of the contract-price of all new works completed by him.
 5. The executive duties imposed by the statute on the District Commissioners and the accounting officers of the Treasury Department require the exercise of judgment and discretion, and are not subject to any judicial control or review.
 6. But, after this executive authority has been finally exercised, a contractor dissatisfied with the result can pursue any authorized judicial remedy, which is subject to no executive control or review.

The act of June 11, 1878 (20 Stat., 106), "providing a permanent form of government for the District of Columbia," authorizes the Commissioners of the District to make "all contracts for the construction, improvement, alteration, or repairs of the streets, avenues, highways, alleys, gutters, sewers, and all work of like nature," within said District, and provides that—

"Good and sufficient bonds to the United States, in a penal sum not less than the amount of the contract, with sureties to be approved by the Commissioners of the District of Columbia, shall be required from all contractors, guaranteeing that the terms of their contracts shall be strictly and faithfully performed to the satisfaction of and acceptance by said Commissioners; and that the contractors shall keep new pavements or other new works in repair for a term of five years from the date of the completion of their contracts; and ten per centum of the cost of all new works shall be retained as an additional security and a guarantee fund to keep the same in repair for said term, which said per centum shall be invested in registered bonds of the United States or of the District of Columbia, and the interest thereon paid to said contractors."

November 1, 1878, Walter R. Davies, by written contract with the Commissioners of the District, agreed, within eighty days, "for the con-

sideration hereinafter mentioned," to lay an asphaltum pavement on the carriage-way of E street between 5th and 11th streets, northwest, in Washington City, District of Columbia, according to specifications. The contract contains, among others, two conditions, as follow :

"6. Partial payments will be made from time to time, during the progress of the work, upon the certificate of the Engineer Commissioner, and payment in full of the amount due will be made upon the certificate of the Engineer Commissioner that the work has been completed and properly executed, excepting the reservations hereinafter named.

"7. Good and sufficient bonds to the United States in a penal sum equal to the estimated amount of the contract, with sureties to be approved by the Commissioners of the District of Columbia, will be required from all contractors, guaranteeing that the terms of their contract will be strictly and faithfully performed to the satisfaction of and acceptance by said Commissioners; and that the contractors will keep new pavements or other new works in repair for a term of five years from the date of the completion of their contracts; and ten per centum of the cost of all new works will be retained as an additional security and a guarantee fund to keep the same in repair for said term, which said per centum will be invested in registered bonds of the United States or of the District of Columbia, and the interest thereon paid to said contractors."

The contract also contains this clause:

"Second. It is further agreed that the party of the second part shall receive for performing the aforesaid work the sum of one dollar and seventy-five (\$1.75) cents per square yard. Payments to be made in warrants for cash upon the United States Treasury."

Bond was given for the faithful performance of the contract.

February 11, 1880, Hon. A. G. Porter, First Comptroller, by letter to the First Auditor on the subject of the proper mode of investing moneys retained under the act of June 11, 1878 (20 Stat., 106), as a guarantee-fund, said that:

"The act requires that the bond [of a contractor] shall be given to the United States.

"Should it become necessary to bring suit thereon, it would have to be instituted in the name of the United States, and, therefore, the additional security and guarantee-fund ought to be in the possession and under the control of the United States, so that, in case of a judgment being obtained against the contractor, the guarantee-fund might, so far as necessary, be applied by the United States to the payment thereof.

"The money to pay for the work having been advanced and charged to the Commissioners, they should pay the contractor ninety per cent. of the cost of all new work, retaining ten per cent., as required by the act. This ten per cent. should be invested by them in registered bonds in the name of the Treasurer of the United States, as trustee for the contractor, subject to the provisions of section 5 of the act of Congress approved June 11, 1878, providing a permanent form of government for the District of Columbia, and these bonds should be delivered to the said Treasurer by the Commissioners, they taking his receipt therefor. Credit can then be given to the Commissioners for the disbursement

upon the receipt of the Treasurer, and the interest paid to the contractors as required by law."

October 29, 1880, Davies duly assigned to A. L. Barber & Co. all his "interest, legal and equitable, in and to the *sum* of \$1,633.54 retained by said Commissioners on account of said contract," and authorized said Barber & Co. to "receive from the proper officers of the United States the interest now due and hereafter to become due on the bonds in which said sum of \$1,633.54 is invested * * * ; and upon the expiration of the time or fulfillment of the conditions, for which said bonds may be held, the said A. L. Barber & Co. * * * are authorized to ask for, and receive of the United States, the bonds in which the said \$1,633.54 may be invested, and to receipt and give acquittances for said bonds and *retained fund*."

The ten *per centum* guarantee-fund retained amounted to \$1,633.54. This amount, except \$43.22 thereof, was invested in registered 3.65 bonds of the District of Columbia, amounting to \$2,000, in the name of the "Treasurer of the United States in trust for W. R. Davies under street contract No. 129, or assigns." The balance of \$43.22 remaining, and the bonds, are in the possession of the Treasurer of the United States.

January 28, 1884, A. L. Barber & Co., by letter to the Secretary of the Treasury, asked him to cause to be delivered to them "the bonds in which the ten *per centum* retained on said contract was invested by the Treasurer of the United States."

February 2, 1884, the Secretary by letter asked the Commissioners whether the pavement laid by Davies under his contract "has been kept in repair, as required by the terms of the contract, and whether the United States or District Commissioners have any claim on the retained percentage claimed by the assignees."

February 6, 1884, *Hon. J. B. Edmonds*, President of the Board of Commissioners of the District of Columbia, by letter to the Secretary of the Treasury, said:

"1st. The pavement has been kept in repair as required by the terms of the contract, and the Commissioners have no claims on the *ten per centum* retained.

2d. But the Commissioners deem it highly important that the *bonds* in which this ten per centum was invested be not surrendered until it be judicially decided that the contractor is legally entitled to receive them, and that he is bound, under all circumstances, to receive them in full satisfaction for the amount originally retained. At this time, it is evidently to the contractor's interest to secure the bonds in which a retain was invested five years ago, because they have increased largely in value; but five years hence it would be equally to the contractor's interest to insist on the payment of the full amount of a retain made to-day, if during the intervening period the value of the securities in which it is invested should fall to a corresponding extent. It is, therefore, deemed necessary to have a judicial determination of the rights of the District and contractors in this respect, before surrendering the bonds, or anything beyond the amount actually retained. The ques-

tion is now pending before the District Court and an early decision is anticipated."*

In the meantime it is suggested that the bonds might be converted, the sum originally retained paid to claimant, and the balance held in trust until the matter is adjusted by the court.

The Commissioners desire to add that they appear to be the persons held responsible under the law for all matters relating to District contracts, including the *retention*, *investment*, and *final payments* of this *ten per centum*, and that the bonds are held in the Treasury Department in *trust only*."

The claimant in each case dismissed his petition without a formal decision.

February 9, 1884, the papers in this case were, by the Assistant Secretary of the Treasury, referred to the First Comptroller, "for his consideration and recommendation."

Hon. A. S. Worthington, for the claimants:

"1. The contemporaneous construction of the statute by the First Comptroller, Secretary of the Treasury, the Treasurer of the United States, and the District Commissioners, is shown by the facts set out on pages 18 to 20 of the Third Annual Report of the Treasurer of the United States on the Sinking Fund and Funded Debt of the District of Columbia. Many sales and assignments of the right to these bonds have been made by the various contractors, and perhaps most of them have been sold to purchasers who bought them on the faith of this contemporaneous construction. Among these *bona fide* purchasers are Courtney and Messrs. Barber & Co., in the two cases that went into court. The act of 19th July, 1876 (19 Stat., 92), relative to the paving of Pennsylvania avenue, contains a provision as to ten per cent. of the cost being retained and invested in bonds, substantially the same as that involved in this discussion, except that the term during which the pavement was to be kept in repair in that case was three years instead of five. At the expiration of the term of three years, the bonds in that case were delivered to the contractors or their assignee without question. It seems never to have occurred to anybody in that case that the District or the Government had any claim on the bonds.

2. If Congress had intended that these bonds should be sold at the end of five years, and that the contractors should have neither more nor less than their ten per cent., some provision would have been made for the contingency of a loss on the bonds, and also for the disposition of the profit in case there should be a profit. As it is, if there should be a loss, as necessarily must sometimes be the case, there is no fund from

* This relates to each of the proceedings in *mandamus* commenced by a contractor in the Supreme Court of the District of Columbia against the Treasurer of the United States to compel him to assign and deliver the guarantee-fund District of Columbia bonds to the claimant. As to these suits, Mr. Worthington, in his letter of February 21, 1884, says:

"At the conclusion of the argument in the two cases, it was apparent . . . that the court were inclined to decide in favor of the District Commissioners on the question of their right to the control of the bonds; and we also thought that the court were against us on the question of our right to the bonds, as the intimations from the bench were to the effect that the contractors were entitled to the full ten per cent. retained and nothing more, and that if there was any profit upon the bonds growing out of their increase in value during the five years, that profit belonged to the District, and that if there was any loss the District should bear it."

which the ten per cent. can be made good, and it will be necessary for the contractors to go to Congress to get an appropriation. So, if there is a profit, to whom is it to go? to the United States or to the District of Columbia? or is it to be divided between them in some unknown ratio? These questions would naturally have occurred to any one framing the statute if it had not been intended that the bonds should go to the contractors.

3. The law states that the bonds are to be held as a 'guarantee fund.' Why call the bonds a 'guarantee fund,' if the fund in fact is the ten per cent. retained? Why, in fact, have any such machinery as the purchase of the 3-65 bonds about the matter at all? Why not provide simply, that at the end of five years the contractor shall receive his ten per cent. retained less the amount used in keeping his pavement in repair. It seems to me absolutely clear that the effect of this statute is precisely what it would have been if the law had required the contractor, after receiving his pay, to invest ten per cent. thereof in 3-65 bonds and deliver them to the District or to the Treasurer as a 'guarantee fund,' &c. If that had been done, the risk would have been run of the contractor getting his money and not delivering the bonds. To avoid that risk, in my judgment, and for no other purpose whatever, it was provided that the ten per cent. should be retained and invested by the District or the Treasurer.

4. The provision that interest on the bonds shall be paid to the contractor seems to me of itself to be decisive. Why pay him interest on what does not belong to him? If the ten per cent. retained is his, and not the bonds, why not pay him interest on the ten per cent.? * * *

The Treasurer is the proper person to hold the bonds pending the term of five years, during which they are to be held as a 'guarantee fund.' * * * The statutes require that all taxes collected by the District shall be paid into the Treasury as well as appropriations made by Congress for its benefit, and shall be disbursed by the Secretary of the Treasury on the warrant of the District Commissioners. Then, when the statute says that 'ten per centum of the cost of all new works shall be retained,' it would seem that Congress could have meant only that it shall be retained by him who has it—that is, by the Treasurer, and manifestly, whoever is directed to retain it is also directed to invest it in bonds. There is little room for construction or argument. One thing, however, is worthy of note: that is, if the Commissioners are right both as to the custody of the bonds, and as to the disposition to be made of them, the District would be enabled to make a profit from the Government in this way—one-half of the retained ten per cent. comes from the United States; but as the District would hold the bonds and sell them, it would receive the profit, which has accrued on nearly all of them, and would thus be enabled to speculate with the moneys of the United States."

The following extract is taken from the Report of the Treasurer of the United States, above referred to:

"Section 5 of the act of June 11, 1878, provides that 'ten per centum of the cost of all new works shall be retained as an additional security and a guarantee-fund to keep the same in repair for said term, which said per centum shall be invested in registered bonds of the United States or of the District of Columbia, and the interest thereon paid to said contractors.'

Under the above provision the Commissioners of the District of Columbia invested the aggregate amount retained from the contractors

in bonds of the United States and of the District of Columbia, which bonds were held by the treasurer of said District, who collected the interest and divided it among the contractors in the proportion that each was entitled to receive.

On February 21, 1880, the First Comptroller of the Treasury addressed the following communication to the Secretary of the Treasury:

'I have the honor to transmit herewith a copy of a letter of this office, under date of the 11th instant, to the First Auditor of the Treasury, relative to what vouchers should be furnished by the Commissioners of the District of Columbia before giving them credit in their accounts for the disbursement of the ten per cent. which section 5 of the act of Congress providing a permanent form of government for said District requires to be retained and invested in registered bonds of the United States or of the District of Columbia, and the interest thereon paid to the contractors. And I would recommend that the Treasurer of the United States be directed to receive from and receipt to the Commissioners of the District of Columbia for the bonds in his favor, as trustee for the several contractors, subject to the provisions of the section before referred to.'

This recommendation of the First Comptroller having been approved by the Secretary, the District Commissioners turned over the following to the Treasurer of the United States:

District of Columbia 3.65 per cent. registered bonds.....	\$81,000 00
District of Columbia 3.65 per cent. coupon bonds.....	1,450 00
United States consols, 1907 (coupon).....	200 00
United States 4 per cent. refunding certificates.....	120 00
Cash.....	51 00

The registered bonds stood in the name of the treasurer of the District of Columbia, and the interest-checks were made payable to his order, but there was nothing on the bonds to show under what contracts they were held. Upon receipt of the securities by this office the account was readjusted, and the amount due under each contract invested separately; the bonds being registered in the name of the 'Treasurer U. S., in trust for ———, under street-contract No. ———;' the interest-checks being drawn in accordance with the inscription in the bonds and indorsed by the Treasurer to the contractor for whom the bonds are held in trust or to his assignee.

In order to make this readjustment, the Treasurer was obliged to sell a portion of the above-described securities; but was enabled to complete the readjustment not only without loss to the contractors interested, but at a positive advantage, by reason of appreciation of the bonds in which the investment was originally made."

Then follows a statement showing the condition of the investments in bonds.

Hon. A. G. Riddle, for the Commissioners of the District of Columbia:

"The fifth section of the act of June 11, 1878, required an investment, so that the contractor might secure interest, while the District received security. It was a deferred payment, on which, in consideration of having finished to the acceptance of the District, he, the contractor, was entitled to interest. He might never receive the payment; when he did it would be in cash, as the law and contract require. The bonds were the property of the District, and at their risk, and would never become the property of the contractor in any event.

That this thing of buying and holding was purely the work of the Commissioners, the whole fifth section is addressed to them. The

Treasurer has merely the custody of the bonds, for the District, with no power in the premises, save on the warrant of the Commissioners."

Hon. J. B. Edmonds, President of the Board of Commissioners of the District of Columbia, in a letter to the First Comptroller, says that:

"Section 5 of the organic act and the ten per cent. clause relate to the Commissioners. The ten per centum is to be retained and invested by them. They having no convenient place for keeping such securities allow them, and gladly so, to be kept by the U. S. Treasury. No duty is devolved by law thereby upon the Treasury, except to deliver or sell the bonds upon the order of the Commissioners, or, if they and the contractors disagree, upon an order of court. This, in brief, is the position of the Commissioners, and such no doubt is the view of the three judges who had the case before them. The Commissioners assume that the opposite must be very clear or the Treasury will leave the case to the courts. It would seem to the Commissioners that further argument by them is not necessary. If the Treasury Department differs from them altogether, they ask such timely notice as will enable them to bring the questions, if possible, before the courts for an authoritative decision."

Hon. Randolph Coyle, Assistant to the Attorney of the United States for the District of Columbia, who appeared for the Treasurer of the United States in proceedings in *mandamus* against him in the Supreme Court of the District in relation to the bonds in question, reported to him the points of the argument of said Assistant Attorney in said proceedings as follow:

"1st. That the organic act of the District, and especially Section 4, clearly manifested an intention that all the fiscal operations of the District should be carried on in subordination, or at any rate under the safeguard of accountability to the Treasury Department, which Department was made the depository of all the moneys of the District and of those of the United States appropriated towards the expenses of the District.

2d. That under Section 1305 of the Revised Statutes United States the Treasurer was the proper custodian of the moneys of the United States, including as well those which were the absolute property of the United States as those merely on deposit with the United States.

3d. That inasmuch as one clause of Section 5 of the 'organic act' provides that all payments on account of work done under the provisions of the act shall be made by the Secretary of the Treasury on the warrant of the Commissioners 'in such amounts and at such times as they may deem safe and proper in view of the progress of the work,' and another clause of the same section provides 'ten per centum of the cost of all new work shall be retained as an additional security and guarantee fund to keep the same in repair for' [the term of five years]. The Commissioners could not lawfully draw for more than ninety (90) per cent. of the cost of any such new work, and that when the law said the other ten (10) per cent. was to be '*retained*' it meant that it was to remain where it was, to wit, in the hands of the Treasurer, and when the law further directed that 'said per centum shall be invested' in certain kind of bonds, it meant that the investment should be made by the officer who had '*retained*' the money—that is to say, by the Treasurer, who became, therefore, the lawful custodian of the bonds."

OPINION BY WILLIAM LAWRENCE, *First Comptroller*.

The act of June 11, 1878 (20 Stat., 106), "providing a permanent form of government for the District of Columbia," requires that:

"Ten per centum of the cost of all new works shall be retained as an additional security and a guarantee fund to keep the same in repair for [five years] * * * which said per centum shall be invested in registered bonds of the United States or of the District of Columbia, and the interest thereon paid to said contractors."

The "new works" constructed by Walter R. Davies, under the contract of November 1, 1878, have been kept in repair for five years, and the retained ten *per centum* amounted to \$1,633.54, which was invested in \$2,000 of 3-65 District of Columbia bonds, leaving a surplus of \$43.22, all held by the Treasurer of the United States. A. L. Barber & Co., as assignees of Davies, have asked the Secretary of the Treasury to cause the bonds to be assigned, and the surplus of \$43.22 to be paid to them.

It is inferred from the letter of the President of the Board of Commissioners of the District of Columbia, of February 6, 1884, that they insist, (1) that they are responsible under the law for all matters relating to District contracts, including the retention, investment, and final payments of this ten *per centum*; (2) that the bonds held by the Treasurer shall be converted into money, and the sum originally retained, \$1,633.54, shall be paid from their proceeds to the claimants; and (3) that the residue of the proceeds shall be held in trust until the rights of the claimants are adjusted by a judicial determination.

The questions thus presented will be considered in the order stated:

I. It is the duty of the District Commissioners, and they have the sole authority, under the act of June 11, 1878 (20 Stat., 106), (1) to *invest* in registered bonds of the United States or of the District of Columbia the ten *per centum* of the cost of all new works retained as an additional security and a guarantee fund to keep the same in repair for five years; and (2) to *control* the payment, to contractors, of the proceeds of such investment, subject to the revision of the proper accounting officers.

1. *As to the investment.* The statute requires said retained fund to be so invested, but does not say *by whom*. The authority of the Commissioners, however, is necessarily *inferred* from the act, and, if not so, is an *incident* of powers given to them and of duties required of them. They are authorized and required to make contracts for new works, to make payments to contractors therefor, and to "have entire control of and make all regulations which they shall deem necessary for keeping in repair the streets, avenues, alleys, and sewers of the city [of Washington], and all other works * * * intrusted to their charge by * * * Congress" (Act June 11, 1878—20 Stat., 102; and see and compare Act June 20, 1874—18 Stat., 116; Act February 21, 1871—16 Stat., 426, sec. 37; Rev. Stat., relating to District of Columbia, 77). The Commissioners are made, by many provisions of statutes, the general executive offi-

cers of the municipal corporation into which the District government has been organized. It is, thus, apparent that some official authority must invest and control the guarantee fund; and the inference, that the statute gives this power to the Commissioners, is entirely natural and proper. The statute declares that bonds "shall be required from all contractors, guaranteeing that the terms of their contracts shall be strictly * * * performed." It says that the sureties thereto are "to be approved by the Commissioners," but does not specify what officers shall require the bonds to be given; yet, it has never been doubted that the Commissioners are charged with this duty. In the same connection, and as part of the provisions relating to the making of contracts and to the paying of the authorized cost thereof, is the provision requiring the *retention* and *investment* of the ten *per centum* guarantee-fund. It is clear that these are recognized as duties of the Commissioners. Even without such recognition they are *incidents* of the general power to make contracts for works and to pay the cost thereof. It is well settled that *INCIDENTS are supplied by intendments*—*Quando lex aliquid concedit, concedere videtur et id, per quod devenitur ad illud* (Potter's Dwaris, Statutes, 123). And this is all the more certain since the statute has not, in terms or by implication, given this power to, nor recognized its existence in, any other officer. The Commissioners had full authority to authorize the investment to be made in the name of the Treasurer of the United States, as trustee (Agency-Delegation case, 3 Lawrence, Compt. Dec., 63).

2. *As to the disbursement of the fund.* Upon the principles already stated, the Commissioners of the District are charged with the duty of making such final disposition of this fund as the law authorizes. That is, if the bonds in which the fund is invested are to be sold, and the proceeds are to be "deposited to the credit of the Treasurer of the United States in the Treasury" (Act March 3, 1879, 20 Stat., 410), these duties must be performed by the Commissioners, or under their direction: if the bonds have become the property of the contractor, or his assignee—the purchaser of whatever right the contractor had—they must be assigned by the Treasurer, holding the legal title, upon the order, or by direction, of the Commissioners. This must be so for reasons already stated, and because the Commissioners are required to decide, at least in the first instance, whether the works have been kept in repair, as the law directs. But it does not follow, that any decision, which may be made by the Commissioners, as to whether a contractor is entitled to the amount of the ten *per centum* guarantee-fund in money, or in the *bonds* into which it has been converted, is conclusive on the accounting officers. The statute provides that:

"The accounts of said Commissioners, and the tax-collectors, and all other officers required to account, shall be settled and adjusted by the accounting officers of the Treasury Department" (Act June 11, 1878—20 Stat., 105, sec. 4).

Thus, the action of the Commissioners is *expressly* made *subject to review* by the First Comptroller, who must necessarily decide whether payments made either in money or in bonds are lawful; and this decision is conclusive on the Commissioners, not merely by statute (Rev. Stat., 191), but without it, on the general principle, that, when a statute gives to a designated officer a specified authority to be exercised in his discretion and on his judgment, his action is final and conclusive, unless provision is made for a review of it (3 Lawrence, Compt. Dec., Introl., xxx, citing authorities). It is by reason of this, that a proper usage has grown up, of asking the opinion of the Comptroller in advance of payment in many cases. But the duty of making whatever payment may be authorized, or of directing whatever action may be *lawfully taken* as to the disposition of the guarantee-fund, is devolved on the Commissioners.

II. Under the act of June 11, 1878 (20 Stat., 106), contractors, who have constructed and kept in repair new works as therein required, are not entitled to the registered bonds of the United States or of the District of Columbia, in which the ten *per centum* guarantee-fund retained under said act has been invested; but said bonds are to be converted into money under the authority of the Commissioners of the District, and from the proceeds they are to pay said contractors a sum of money equal to the amount of the ten *per centum* retained. The reasons which support this view seem conclusive:

1. This is the necessary effect of the contract in this case. It expressly provides, that the contractor "shall receive for performing the * * * work the sum of one dollar and seventy-five cents per square yard—payments to be made in warrants for cash upon the United States Treasury"—and that "partial payments will be made from time to time, during the progress of the work, * * * and payment in full of the amount due will be made upon the certificate of the Engineer Commissioner that the work has been completed and properly executed, excepting the reservations hereinafter named." Thus, it is clear, that the *whole price* to be paid is \$1.75 per square yard; that *all* payments are to be made "in warrants for cash"; that "partial payments," and "payment in full" excepting the reservation of ten *per centum*, these payments being 90 *per centum* of the whole sum at \$1.75 per square yard—are to be made upon the certificate of the Engineer Commissioner; and that the final payment of the retained ten *per centum*, which is covered by the expression "reservations hereinafter named," is to be made, certainly in one particular, precisely as the other payments—that is, "in warrants for cash." A payment in bonds would not be a payment in cash. The contract says that payments of *all* shall be made in cash—it is nowhere said that any part may be paid in bonds. The whole price is to be \$1.75 per square yard; if ten *per centum* of this be paid in bonds, the total payment will exceed in value this price, since bonds are worth a premium of *fifteen per cent.*; and if they should fall

below *par*, the contractor would not receive the full value of the contract—"cost." The contract further says that "ten *per centum* of the cost of all new works will be retained as * * * a guarantee fund." This recognizes the contract price of \$1.75 per square yard as the *total cost*, and it is *this cost* in cash which the contractor is to receive.

2. The statute is equally explicit (act June 11, 1878—20 Stat., 106). It provides that "the *cost* of laying down * * * pavements * * * and other works * * * shall be paid for in the following [1] *proportions* and [2] *manner* :

As to the *proportions*, it specifies the share to be paid by street-railway companies, by the United States, and by the District Government. As to the "*manner*" of payment, it is declared that:—

"All payments shall be made * * * on the * * * order of the Commissioners * * *, in such *amounts* and at such times as they may deem safe and proper in view of the progress of the work"; "and ten *per centum* of the *cost* of all new works shall be retained as * * * a guarantee fund to keep the same in repair for said term [of five years], which said *per centum* shall be invested in registered bonds of the United States or of the District of Columbia and the *interest thereon paid to said contractors*."

It is nowhere said, that the *bonds* shall at *any time* be paid to the contractor. Special provision is made for the payment of interest to contractors, as compensation for the five years' delay in the payment of the ten *per centum* retained of the "*cost*" of new works. And this special provision is necessary, because the *bonds* are *not*, and cannot be, in any event the property of the contractor. If they became *his* property, even subject to a claim for keeping works in repair, no provision requiring interest to be paid to him was necessary, since nothing is to be *retained* but "ten *per centum* of the *cost* of all new works"—that is, the *principal sum* of the ten *per centum*. The interest on the bonds is an *accessory* thereof; but the right to the interest so given by statute to the contractor does not in the least indicate that he is the owner of the principal—the bonds—because (1) the ownership of the *interest* is specially given by statute to the contractor, while that of the bonds is not; and because (2), on general principles, the right to the *accessory* does not carry with it the right to the principal—*accessorium non trahit principale—accessorium non ducit sed sequitur suum principale* (Broom, Legal Max., 492).

3. There has been no contemporaneous construction, in favor of the view that contractors are entitled to the *bonds*, which will support such claim. Under the act of July 19, 1876 (19 Stat., 92), the bonds therein mentioned were, "without question," delivered to contractors. The First Comptroller, in his letter of February 11, 1880, advised that the guarantee-fund should be invested by the Commissioners "in registered bonds in the name of the Treasurer of the United States, as trustee for the contractor, *subject to the provisions of section 5* of the act of * * * June 11, 1878." The form of trust inscribed in the bonds seems to favor

the claim for them ; but it is certain that this form is not correct. So far as the *interest* on the bonds is concerned, the trust is for the contractor. So far as it is indemnity to keep works in repair, the United States is the beneficiary as to one-half, and the District as to the other half. The trust declared in the bonds should have been "under the contract (described) for the purposes required by it and the act of June 11, 1878." The form of the trust which was inscribed in the bonds cannot change its real character or effect, as prescribed by law. And it is apparent that the ultimate right to the bonds was not considered or decided under the act of July 19, 1876.

When Safford & Co.'s case (1 Lawrence, Compt. Dec., 2d ed., 262) was decided under the latter act, all parties in interest conceded, "without question," that the *bonds* were to be delivered to the proper claimant. The only question in controversy was as to the rightful claimant. No other question was decided. The present question was not considered in that case. It did not pass in *rem judicatam*, and the contract in that case was not *precisely* in the same form as the contract in this case. There has been no decision by the Comptroller of the question now presented under the act of June 11, 1878. He advised that the trust be made "*subject to the provisions of section 5 of*" this act. There has been no usage on this subject so long continued as to establish a rule of law on the present question. The whole question is now open for the opinion of the First Comptroller, the only officer who can, in the settlement of the accounts of the Commissioners, finally decide such question, so far as the Executive branch of the Government is concerned. And it must be held, that the claimants in this case are not entitled to the bonds, but that they shall be sold under the direction of the Commissioners; that the whole proceeds shall, as "revenues of the District, * * * be deposited to the credit of the Treasurer of the United States in the Treasury (Act March 3, 1879—20 Stat., 410; Act June 11, 1878, *Id.*, 105, sec. 4); and that the claimants shall be paid in money \$1,633.54.

III. The surplus-proceeds of, or profits on, the sale of the guarantee-fund bonds after paying the amount due to the claimants, become "revenues of the District" (Act March 3, 1879—20 Stat., 410; Act June 11, 1878, *Id.*, 105, sec. 4), at least to the extent of *one-half*; and the *remaining half*, having resulted from appropriations from the Treasury of the United States (Act June 11, 1878—20 Stat., 104, sec. 3), may, perhaps, be claimed by, and as belonging to, the United States. As to the surplus-proceeds or profits mentioned, the Commissioners of the District have "suggested" that the same be "held in trust until the matter [of their disposition] is adjusted by the court."

1. There is no authority by which such surplus-proceeds or profits can be so "held in trust." The law has imposed executive duties on the Commissioners of the District as to the guarantee-fund bonds and their proceeds, which duties, subject to the authorized review by the accounting officers, said Commissioners are required to perform; and,

as to any matter requiring the exercise of discretion and judgment, neither they nor the accounting officers are subject to any judicial determination, direction, control, or review. The Constitution has wisely made executive officers, in the performance of such duties, independent of the courts, and with equal wisdom has given to the courts powers to be exercised and duties to be performed equally independent of executive determination, direction, control, or review. In some cases, when the rights of claimants have been denied by executive officers, the courts may furnish relief wholly without reference to the opinions or judgment of such officers. But in such cases judicial authority begins after executive authority ends. Judicial authority so exercised is not a review or reversal of what executive officers have done, because from the action of the latter no appeal lies to any court, nor is such action controlled by writs of *certiorari* or of *error*, or by other reviewing process: A judicial remedy is simply afforded in the exercise of a separate and independent jurisdiction. These questions have been elsewhere sufficiently discussed (Keyser's case, 4 Lawrence, Compt. Dec., 263; 3 Lawrence, Compt. Dec., Intro., xxxix; Safford & Co.'s case, 1 Lawrence, Compt. Dec., 2d ed., 262).

2. It follows, that the duties of the Commissioners are, to sell the bonds in this case, to cause the proceeds as "revenue of the District" to "be deposited to the credit of the Treasurer of the United States in the Treasury" (Act March 3, 1879—20 Stat., 410; Act June 11, 1878—*Id.*, 105, sec. 4), and to pay the claimants \$1,633.54, being the amount of ten *per centum* of the cost of the work, retained as the guarantee-fund.

3. The *appropriation* for the payment of work performed under the contract in this case was made by the act of June 20, 1878 (20 Stat., 208), and the deficiency act of March 3, 1879 (*Id.*, 416). The whole appropriation for "new works" under these acts has been exhausted. The ten *per centum* guarantee-fund taken from the appropriation, having been invested in District and United States bonds, the accounts of the Commissioners of the District as to *that appropriation* have been closed.

IV. The question of Treasury Department practice is now to be settled as to the proper mode of *disposing of* and *keeping* the *accounts* relating to the guarantee-fund bonds.

The character of the appropriation made by the acts of June 20, 1878 (20 Stat., 208), and March 3, 1879 (*Id.*, 416), is to be determined from those acts read in connection with the acts of June 11, 1878 (*Id.*, 105, 106), and March 3, 1879 (*Id.*, 410).

Ninety *per cent.* of the appropriation made for the construction of "new works" is simply an ordinary "*annual appropriation.*" The remaining ten *per centum* for the guarantee-fund is equally an "*annual appropriation*" to be invested in guarantee-fund bonds. Thus, the whole appropriation made by said acts of June 20, 1878, and March 3, 1879, is annual, and, as heretofore shown, has been finally disposed of. The separation into parts is now made, because, by the four several acts

last above mentioned and section 3618, of the Revised Statutes, authority is given to sell the guarantee-fund bonds and dispose of the proceeds. Said acts require an amount equal to ten *per centum* of the cost of the "new works" to be "invested in registered bonds," and to "be retained as * * * a guarantee-fund to keep the same ["new works"] in repair for said term" of five years "from the date of the completion of" the contracts. These acts authorize a sale of said guarantee-fund bonds as "public property"; require the proceeds to "be deposited to the credit of the Treasurer of the United States in the Treasury" (Act March 3, 1879—20 Stat., 410), as a "revenue" of the District to "be drawn therefrom upon requisition of the Commissioners * * * specifying the appropriation upon which the same is drawn" (*Id.*); and also require the gross proceeds to be applied in the order stated to three objects, as follows:—

(1) To pay the cost of keeping "new works" in repair for five years, not exceeding ten *per centum* of the contract-price of such works, if contractors fail to do so; or, in case of performance of the contracts;

(2) To pay each contractor, who has complied with his contract and kept his works in repair for five years, the retained ten *per centum* of the contract-price of "new works," and

(3) To dispose of the surplus-proceeds, or profits arising from the sale of the bonds, if any, as required by section 3618 of the Revised Statutes.

From the authority to thus sell the guarantee-fund bonds and dispose of the gross proceeds, there arises by inference, if not in express terms, an appropriation, *not necessarily of all* such proceeds, but *only of so much* thereof, as may be necessary to meet the *first two* of the three objects mentioned. As to the residue or surplus proceeds, if any, no appropriation is made—it is simply subject to the operation of section 3618 of the Revised Statutes. In respect to the *first two* objects stated, the Commissioners of the District are charged with a trust or duty, from said gross proceeds to apply a sufficient amount to meet these two objects, as to each contract in the order stated. That is, that portion of the guarantee-fund arising under any one contract is to be applied, (1) to keep the works made under it in repair, to the extent stated; then (2) to pay the contractor ten *per centum* of the contract-price, less any sum expended in repairs, and finally (3) to dispose of the *surplus*, if any (as to which no appropriation is made), as required by section 3618 of the Revised Statutes. But, as contracts may not all be made, nor works under them completed, at the same date, and as there may be surplus-proceeds or profits arising from the guarantee-fund bonds under one contract, and a loss arising on the sale of such bonds under other contracts, made under the appropriation for "new works" for the *same* fiscal year, it may happen that this surplus-proceeds may be required to meet the deficiency arising from sales of bonds belonging to the guarantee-fund under such other contracts, in

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"Section 5 of the organic act and the ten per cent. clause relate to the Commissioners. The ten per centum is to be retained and invested by them. They having no convenient place for keeping such securities allow them, and gladly so, to be kept by the U. S. Treasury. No duty is devolved by law thereby upon the Treasury, except to deliver or sell the bonds upon the order of the Commissioners, or, if they and the contractors disagree, upon an order of court. This, in brief, is the position of the Commissioners, and such no doubt is the view of the three judges who had the case before them. The Commissioners assume that the opposite must be very clear or the Treasury will leave the case to the courts. It would seem to the Commissioners that further argument by them is not necessary. If the Treasury Department differs from them altogether, they ask such timely notice as will enable them to bring the questions, if possible, before the courts for an authoritative decision."

Hon. Randolph Coyle, Assistant to the Attorney of the United States for the District of Columbia, who appeared for the Treasurer of the United States in proceedings in *mandamus* against him in the Supreme Court of the District in relation to the bonds in question, reported to him the points of the argument of said Assistant Attorney in said proceedings as follow:

"1st. That the organic act of the District, and especially Section 4, clearly manifested an intention that all the fiscal operations of the District should be carried on in subordination, or at any rate under the safeguard of accountability to the Treasury Department, which Department was made the depository of all the moneys of the District and of those of the United States appropriated towards the expenses of the District.

2d. That under Section 1305 of the Revised Statutes United States the Treasurer was the proper custodian of the moneys of the United States, including as well those which were the absolute property of the United States as those merely on deposit with the United States.

3d. That inasmuch as one clause of Section 5 of the 'organic act' provides that all payments on account of work done under the provisions of the act shall be made by the Secretary of the Treasury on the warrant of the Commissioners 'in such amounts and at such times as they may deem safe and proper in view of the progress of the work,' and another clause of the same section provides 'ten per centum of the cost of all new work shall be retained as an additional security and guarantee fund to keep the same in repair for' [the term of five years]. The Commissioners could not lawfully draw for more than ninety (90) per cent. of the cost of any such new work, and that when the law said the other ten (10) per cent. was to be '*retained*' it meant that it was to remain where it was, to wit, in the hands of the Treasurer, and when the law further directed that 'said per centum shall be invested' in certain kind of bonds, it meant that the investment should be made by the officer who had '*retained*' the money—that is to say, by the Treasurer, who became, therefore, the lawful custodian of the bonds."

may properly make requisitions from time to time, "specifying [this] * * * appropriation" (Act March 3, 1879—20 Stat., 410), to pay for keeping works in repair, and to contractors, any portion, or the whole, of the retained ten *per centum* due them. Thus, *two* of the *three* objects of the "guarantee-fund" will be accomplished. In this mode, the District Commissioners will account to the Treasury Department, and their action will be subject to the review of the proper accounting officers, as required by law.

It will be entirely competent for the Commissioners of the District in performing the duties or executing the trusts mentioned, to sell only so much of the guarantee-fund bonds for any one year as may be necessary to effect the first two objects mentioned—that is, to keep works in repair to the extent authorized, and to pay sums due to contractors from the retained ten *per centum* of the contract-price of "new works" under their respective contracts—and to leave the residue of the bonds to be sold, and the proceeds thereof to be disposed of, as Congress may authorize or direct consistently with the rights of the District and of the United States respectively.

But if, on the final adjustment of the accounts of contractors, for any one fiscal year, there may be surplus-proceeds or profits, arising from the sale of guarantee-fund bonds, these must be disposed of. As already shown, no disposition can be made of any surplus-proceeds arising under *one* contract, until the final adjustment of all contracts with which it is connected for the proper fiscal year. But when the final surplus, if any, is ascertained, it must be disposed of in some way. It will belong to the "guarantee-fund" until such final disposition of it be made (1) *as is*, or (2) *may be*, authorized by law. The conclusion reached as to such final disposition may now be stated.

1. The *surplus-proceeds* mentioned have *not* been *appropriated* to "be disbursed for the expenses of said District." Such surplus-proceeds, at least to the extent of *one-half* thereof, are *revenues* of the District," though *not* "taxes collected." The acts of June 11, 1878 (20 Stat., 105, sec. 4) and of March 3, 1879 (*Id.*, 410), must be regarded as *in pari materia*, and construed together, to ascertain the purpose of Congress. The former act provides that:

"All *taxes collected* shall be paid into the Treasury of the United States, and the same, as well as the appropriations to be made by Congress as aforesaid, *shall be disbursed for the expenses of said District*, on itemized vouchers, which shall have been audited and approved by the Auditor of the District of Columbia, certified by said Commissioners, or a majority of them; and the accounts of said Commissioners, and the tax-collectors, and all other officers required to account, shall be settled and adjusted by the accounting officers of the Treasury Department of the United States."

The latter act provides that:

"All moneys appropriated under this act, together with all *revenues* of the District of Columbia *from taxes or otherwise*, shall be deposited, to the credit of the Treasurer of the United States, in the Treasury, as

required by the provisions of section four of an act approved June eleventh, eighteen hundred and seventy-eight, and shall be drawn therefrom upon the requisition of the Commissioners of the District of Columbia, such requisitions *specifying the appropriation* upon which the same is drawn; and in no case shall such appropriations be exceeded, either in requisition or expenditure; and the accounts for all disbursements shall be made monthly to the accounting officers of the Treasury by the Auditor of the District of Columbia, upon vouchers certified by the Commissioners of the District of Columbia, as now required by law."

The first act mentioned declares that "all taxes collected" in the District "shall be disbursed for the expenses of said District." This word, taxes, is a *nomen generalissimum* including taxes on chattels, and on realty, assessments, license fees, and revenues in every form, which, as the statute says, are to be "collected." But the latter act shows that Congress foresaw that the District would sometimes receive money "otherwise" than taxes, as (1) from sales of property, (2) from profits on investments, and, possibly, (3) by gifts, bequests, &c. It was accordingly provided, that "all revenues of the District * * * from taxes or otherwise, shall be deposited, to the credit of the Treasurer of the United States, in the Treasury." But it is *not* provided, that *all* revenues "shall be disbursed for the expenses of said District," but *only* that "taxes collected" shall be so disbursed. And no money can be drawn from the Treasury, except by virtue of an appropriation.

The act of June 11, 1878 (20 Stat., 104), requires annual estimates to be transmitted to Congress of proposed expenditures for the District, and then provides that:

"To the extent to which Congress shall approve of said estimates, Congress shall appropriate the amount of fifty per centum thereof; and the remaining fifty per centum of such approved estimates shall be levied and assessed upon the taxable property and privileges in said District other than the property of the United States and of the District of Columbia."

Here, again, is a provision that "the expenses of said District" shall be paid from money "levied and assessed upon the taxable property and privileges in said District," but not from revenues "otherwise" derived. Thus, *only taxes on property and privileges*, taxes which can be "collected," are appropriated to "be disbursed for the expenses of said District." Congress has been careful to appropriate not *all* the revenues of the District, but only that *part* of the revenues derived from *taxes on property and privileges*. It is evident, that Congress did not "appropriate" or authorize to be used the *whole* income or profits which might accrue to the District. The act of March 3, 1879 (20 Stat., 410), refers to "revenues" arising "otherwise" than from taxes, and requires "all" to be deposited in the Treasury. This form of expression was, doubtless, used, and properly so, to include such profits as the surplus proceeds of bond sales now under consideration. Thus, Webster defines "revenue" as follows:

"1. That which returns, or comes back, from an investment; the annual rents, profits, interest, or issues, of any species of property, real or personal; income.

"Do not anticipate your *revenue*, and live upon air till you know what you are worth. (Gray.)

"2. Hence, return; reward; as, a rich *revenue* of praise.

"3. The annual produce of taxes, excise, customs, duties, rents, &c., which a nation or state collects and receives into the treasury for public use."*

It must be apparent, therefore, that the surplus-proceeds of the bond-sales now in question cannot be carried to the credit of any appropriation to be disbursed by the Commissioners, nor otherwise applied for the benefit, or on the indebtedness, of the District. No statute has appropriated such proceeds or authorized their use for any such purpose.

It must be supposed that Congress acted wisely in not authorizing any money to "be disbursed for the expenses of said District" except "taxes collected." If the Commissioners had authority to expend the "proceeds of sales of * * * public property" without a specific appropriation thereof by Congress, an inducement might, thus, be held out to make sales to increase the amount of expenditures. The District of Columbia might be the recipient of a gift of a million of dollars; and it may well be supposed that Congress would reserve to itself the authority to determine by an appropriation how this should be disposed of. The profits on the sale of guarantee-fund bonds might be large; and Congress would naturally and properly reserve to itself the authority to say how they should be disposed of. It is, thus, certain, that Congress has not made an appropriation of the surplus-proceeds now in question, nor given the Commissioners any authority or discretion to apply them to such purposes as they may choose, but has retained that power to be prescribed by law hereafter.

2. Said surplus-proceeds cannot be carried to the "surplus fund." Section 5 of the act of June 20, 1874 (18 Stat., 110), provides:—

"That from and after the first day of July, eighteen hundred and seventy-four, and of each year thereafter, the Secretary of the Treasury shall cause all unexpended balances of appropriations which shall have remained upon the books of the Treasury for two fiscal years to be carried to the surplus fund and covered into the Treasury; *Provided*, That this provision shall not apply to permanent specific appropriations," &c. (Mississippi Central Railroad Co.'s case, 4 Lawrence, Compt. Dec., 567; Availability-Appropriation case, *Id.*, 134; Rev. Stat., 3690).

* Bouvier defines "revenue"—"The income of the government arising from taxation, duties, and the like; and, according to some correct lawyers, under the idea of revenue is also included the proceeds of the sale of stocks, lands, and other property owned by the government. Story, Const., § 877. By revenue is also understood the income of private individuals and corporations."

And see—Fletcher v. Oliver (25 Ark., 289), Babcock v. Goodrich (47 Cal., 488), Warner v. Fowler (4 Blatchf., 311), The Abigail (3 Mason, 331), The Nashville (4 Bliss, 1st), Peyton v. Bliss (1 Woolw., 170), Davenport v. Doves (15 Wall., 390), United States v. Norton (91 U. S., 567), Stevens v. Mack (5 Blatchf., 514), Parsons v. Hunter (2 Sumner, 425), United States v. Wright (3 Pittsb., 192), Welch v. Hotchkiss (39 Conn., 142), and Webster v. People (98 Ill., 343).

This section applies as well to appropriations made for the expenses of the District of Columbia as to all others not excepted therein. In comprehensive terms it applies to "*all unexpended balances of appropriations*" not so excepted. If any part of the money appropriated by Congress from taxes collected in the District should be covered into the Treasury, carried to the surplus fund, and *kept there*, this would be unjust to the taxpayers of the District, and Congress would undoubtedly re-appropriate such part for the benefit of the District. But the surplus-proceeds of the bond-sales now in question cannot be carried to the surplus fund; because they do not arise from taxes, and, so, have never been appropriated. They are not covered by the appropriations made for "*new works*" by the acts of June 20, 1878 (20 Stat., 208), and March 3, 1879 (*Id.*, 416); because, as already shown, "*the whole appropriation for new works under these acts has been exhausted.*" They cannot go to the surplus fund under the "*guarantee-fund appropriation*"; because that is a permanent specific appropriation to keep works in repair and pay contractors, and the residue, being the surplus-proceeds arising from the sale of "*public property*," remains unappropriated, and is otherwise provided for.

3. The surplus-proceeds now in question are to be "*covered into the Treasury as miscellaneous receipts, on account of 'proceeds of Government property,'*" only to be withdrawn or applied as may be directed by "*subsequent appropriation made by law.*" This is expressly required by the Revised Statutes, as follows:

"SEC. 3618. All proceeds of sales of old material, condemned stores, supplies, or other public property of any kind, except the proceeds of the sale or leasing of marine hospitals, or of the sales of revenue-cutters, or of the sales of commissary stores to the officers and enlisted men of the Army (or of materials, stores, or supplies sold to officers and soldiers of the Army), or of the sale of condemned Navy clothing, or of sales of materials, stores, or supplies to any exploring or surveying expedition authorized by law, shall be deposited and covered into the Treasury as miscellaneous receipts, on account of '*proceeds of Government property*,' and shall not be withdrawn or applied, except *in consequence of a subsequent appropriation made by law.*"

This section applies to proceeds of sales of "*public property of any kind.*" If, therefore, the guarantee-fund bonds are "*public property*," the surplus-proceeds are controlled by said section. And it is clear that such bonds are "*public property*," (Proceeds of Sales case, 3 Lawrence, Compt. Dec., 38). It has been sometimes supposed that the District of Columbia, as a municipal corporation, was for all purposes distinct from and independent of the Government of the United States. On the contrary, it is, simply within the District and for certain purposes, a part of the Government of the United States, as much as, or even more so than, that part of the government of a Territory of the United States controlled by officers appointed by the President (Rev. Stat., 1839-1976), or than the government exercised over forts, magazines, arsenals, and dock-yards, under the authority of Article I, section 8,

paragraph 17, of the Constitution. The officers of the District are officers of the United States, just as the Governor and other officers of a Territory are officers of the United States. Thus, in Cox's case (14 Ct. Cl., 513), it is said that :

"The office of a member of the board of health for the District of Columbia, although in one sense a municipal office, was yet an office under the general government. It was created by an act of Congress, was filled by the appointment of the President by and with the advice and consent of the Senate, and its salary was to be paid by the government at the Treasury of the United States. Although its sphere of duties was local, and limited to the municipal corporation created by the act of Congress, it was none the less an office under the government."

The officers of the District are subject to many of the restraints and regulations imposed by statutes on other officers of the United States. (Clerk's case, 1 Lawrence, Compt. Dec., 2d ed., 306; Barnes v. District of Columbia, 91 U. S., 540; Rheem's case, 3 Lawrence, Compt. Dec., 308; Sister Elizabeth's case, 2 Lawrence, Compt. Dec., 2d ed., 120, 127; Fish's case, *Id.*, 537; Police Station case, *Id.*, 342; Randolph's case, *Id.*, 19; District Contracts case, 3 Lawrence, Compt. Dec., 198; Halstead's case, 3 *Id.*, 238; Informer's case, 3 *Id.*, 264; Coyle's case, 4 *Id.*, 517; District Commissioners' case, 4 *Id.*, 388; Keyser's case, 4 *Id.*, 274.)

Congress can alter or abolish the form of government for the District, and provide for its government precisely as in the Territories, or otherwise. The expenses of its government are paid, in part from taxes levied on property in the District, and in part from moneys appropriated from the general Treasury of the United States. The whole revenues of the District are subject to control and appropriation by Congress, just as all other public revenues of the United States. When property is purchased for the use of the District from money so appropriated, such property is public property for public purposes, as much so as similar property purchased for a fort, for a Territory, or for any other public purpose of the United States in any branch of the public service. When the public property so purchased for a fort, or a Territory, or a court of the United States, or for any other branch of the public service is sold, its proceeds are to be disposed of as required by section 3613 of the Revised Statutes. The proceeds of sales of property purchased by authority of the United States for the use of a hospital created by authority of Congress are subject to said section (St. Elizabeth's Hospital case, 3 Lawrence, Compt. Dec., 57). Clearly, then, as stated, the guarantee-fund bonds are "public property." They certainly are not private property. And, because they are public property, the statute requires their *gross* proceeds to be paid into the Treasury of the United States to the credit of the Treasurer, necessarily subject to the operation of the laws of the United States. They are thus treated by law as public property, subject to the control of law.

It has been supposed, that it is the duty of the Treasurer of the United States to deposit the *surplus* to the credit of the District as a revenue derived from the investment in the bonds. But the inquiry may well be made, by *what law* can the Treasurer make such deposit? No statute gives authority to do this. By express statute, as already shown, the gross proceeds of bond-sales are to "be deposited to the credit of the Treasurer of the United States in the Treasury" (Act March 3, 1879—20 Stat., 410), and are then to be carried to the credit of the "guarantee-fund appropriation" to pay for keeping "new works" in repair, and contractors, and the surplus is required to go, by virtue of section 3618 of the Revised Statutes, to the credit of miscellaneous receipts to await "a subsequent appropriation made by law." If, as seems to be generally admitted, said surplus-proceeds cannot be expended *until appropriated by Congress*, what advantage or propriety is there in placing such proceeds to the credit of the District, rather than to the credit of miscellaneous receipts; since "a subsequent appropriation" will be as useful from the latter credit as from the former if such surplus-proceeds cannot be expended *until appropriated*, they cannot be applied as a credit to the District in settling the accounts between it and the United States; because to *so apply* said surplus would be to *use and expend it* without an appropriation by Congress. No statute authorizes it to be so applied. Such application of it would practically be an appropriation made by the Commissioners without authority of law, whereas Congress is the proper authority to make the appropriation, and to determine whether such surplus proceeds shall be applied as a credit to the District, or shall be used for some other purpose. The surplus-proceeds are as safe when lawfully placed to the credit of "miscellaneous receipts," as they would be if placed to the credit of the District.

It seems to be supposed that the method of book-keeping adopted in the Treasury Department invests the United States with the ultimate right to these surplus-proceeds, or applies them to the use of the Government. The surplus-proceeds in question arise from an investment in bonds purchased with money contributed by the United States from its Treasury, by appropriation derived equally from taxes collected in the District and from general sources. Such surplus-proceeds cannot, therefore, properly be said to be the money of the District. If they can have a single owner, that owner must be the United States. But, in all reason and justice, they would seem to be, and, doubtless, will be, regarded by Congress as property in equity, owned, one-half by the United States, and one-half by the District; so that, by "subsequent appropriation," Congress will probably authorize *all* of said surplus-proceeds to be "disbursed for the expenses of said District." It is not at all correct to say that the system of book-keeping and credits adopted in the Treasury Department, as required by law, applies this money to the use of the United States. The money will be simply in

the Treasury of the United States—a safe place of custody—none more so—the custody required by law. Such money cannot be used any more by the United States than by the District, until, or unless, Congress shall determine as section 3618 of the Revised Statutes says, by “a subsequent appropriation made by law,” what disposition thereof shall be made. It will be in the Treasury, subject to the control of Congress. No officer of the Government can lawfully use it, until Congress shall give authority to do so. No officer can deprive Congress of the power which the laws have reserved to it.

V. Finally, expediency is not a guide in construing statutes, except so far as absurd or unjust consequences may be proper for consideration (Bishop, *Written Laws*, 82, 90, 93, 200). But the conclusions reached are all the more satisfactory, since in practice they will be found expedient and just. The Government may profit by the investments in bonds under the appropriation acts now under consideration. But the principles now adopted will be applicable in all cases hereafter. With the price which bonds have now attained, the Government may be quite as likely to lose as to gain by future investments. The risk is with the Government. Contractors will have a certainty in any event, that they will receive a *fixed price* for their work; and, thus, justice will be secured for them. By this they will inevitably profit. The Government, even by assuming the risk, will also profit; because contractors, having a certainty of a fixed price, will not add to bids anything by way of indemnity against the risk of loss by investments in bonds.

In this case the claimants should be paid \$1,633.54, being the amount of 10 *per centum* of the cost of “new” works retained as a “guarantee fund.”

The Secretary of the Treasury will be advised accordingly.

TREASURY DEPARTMENT,

First Comptroller's Office, April 25, 1884.

IN THE MATTER OF THE RIGHT OF THE COMMISSIONERS OF THE DISTRICT OF COLUMBIA, BY VIRTUE OF THE "SEWERAGE SYSTEM" ACT OF JUNE 30, 1884, TO APPLY "TO THE LIQUIDATION OF THE AMOUNTS" CHARGED UNDER SAID ACT BY THE UNITED STATES AGAINST SAID DISTRICT, THE SURPLUS-PROCEEDS OF THE SALE OF THE "GUARANTEE FUND" BOND-INVESTMENT MADE BY AUTHORITY OF THE ACTS OF JUNE 11, 1878 (20 STAT., 106); JUNE 20, 1878 (*Id.*, 208); MARCH 3, 1879 (*Id.*, 416); AND MARCH 3, 1879 (*Id.*, 410).—GUARANTEE-FUND CASE (SECOND).

1. Section 3618 of the Revised Statutes requires the proceeds of sales of public property to "be deposited and covered into the Treasury as miscellaneous receipts," which cannot be "withdrawn or applied, except in consequence of a subsequent appropriation made by law."
2. This section applies to the surplus-proceeds of the sale of the guarantee-fund bonds arising from investments under the acts of June 11, 1878 (20 Stat., 106); June 20, 1878 (*Id.*, 208); March 3, 1879 (*Id.*, 416); and March 3, 1879 (*Id.*, 410).
3. The District of Columbia "sewerage system" act of June 30, 1884, does not make any appropriation of such surplus-proceeds, nor change the disposition thereof, required by section 3618 of the Revised Statutes; they are not "unexpended balances of appropriations," nor "amounts of money * * * which have been deposited by the District in the Treasury" at the date of said act; but they are subsequently deposited amounts.
4. "Unexpended balances of appropriations" consist of moneys once appropriated, but not used for, nor applied to, the purposes of such appropriations.
5. The act of June 30, 1884, authorizes one-half of unexpended balances of those appropriations existing at the date of said act, or theretofore made, "for the support of the Government of the District of Columbia"—no matter when said unexpended balances are ascertained—to be applied "to the liquidation of the amounts * * * charged to the District" under said act.
6. Said act includes such unexpended balances, even though they may have been carried to the surplus-fund under the act of June 20, 1874 (18 Stat., 110, sec. 5); they may, by warrant, be carried from such surplus-fund to the credit of the District, under the former act.
7. The unexpended balances mentioned do not embrace those arising from "appropriations for interest and sinking-fund for the District."
8. The District of Columbia appropriation act of July 5, 1884, saves unexpended balances of "appropriations for interest and sinking-fund for the District," whether now, hereafter, or theretofore existing, from being "carried to the surplus-fund and covered into the Treasury" under the act of June 20, 1874 (18 Stat., 110, sec. 5).
9. The unexpended balances last mentioned become permanent specific "appropriations for interest and sinking-fund for the District of Columbia."

This case is supplemental to the Guarantee-Fund case (*ante*,) in which an opinion was rendered April 25, 1884. The present case arises out of acts since passed by Congress—"the sewerage system" act of June 30, 1884, and the District of Columbia appropriation act of July 5, 1884.

The acts of June 11, 1878 (20 Stat., 106), and March 3, 1879 (*Id.*, 410), authorized the construction of "new works" in the District of Columbia;

and the acts of June 20, 1878 (*Id.*, 208), and March 3, 1879 (*Id.*, 416), appropriated money to pay therefor. Under these acts it was made the duty of the Commissioners of the District to retain ten *per centum* of the cost of all such works for five years from the completion of the contracts, as a guarantee-fund to keep the same in repair; to invest said fund in registered bonds of the United States, or of the District of Columbia, to pay the interest thereon to the contractors; and, at the proper time, to sell the guarantee-fund bonds, to deposit the proceeds in the Treasury of the United States to the credit of the Treasurer, to be carried to the credit of the "guarantee-fund" appropriation, and out of this to pay the cost of the repairs, if any, and to pay the residue of the ten *per cent.* of the contract-price to the contractors: and the surplus-proceeds or profits, if any, arising from the sale of the bonds are to be covered into the Treasury to the credit of Miscellaneous Receipts as proceeds of sales of public property, to await an appropriation by Congress. The only guarantee-fund bonds disposed of were sold August 5, 1884, producing gross receipts \$39,987.54, *deposited in the Treasury August 11, 1884*, less expenses of sale \$10, and leaving net receipts \$39,977.54, out of which there was due and paid to contractors \$30,130.78, leaving surplus \$9,846.76. August 16, 1884, the Commissioners of the District addressed a letter to the Secretary of the Treasury, in which, in view of action heretofore had, they say that:—

"Nothing then remained but to treat the bonds as the property of the Commissioners whose duty it was to sell them, and out of the proceeds pay the contractors what is due them, and deposit the surplus to the credit of the *District of Columbia*, as a revenue derived from the investment, and which, like other revenues of the District, must be deposited in the Treasury to its credit, and cannot be expended until appropriated by Congress.

"If this surplus money, or any portion thereof, properly belongs to the District of Columbia, it is equally important to have it placed to its credit in the Treasury, whether appropriated or not; for the act of June 30, 1884, making an appropriation for the completion of the sewerage system, advances money to the District of Columbia partly upon the fact that the District has unappropriated sums and balances of appropriations lying to its credit in the Treasury—and requires the District to pay interest at 4 per cent. only upon sums advanced beyond such unexpended amounts. * * * You will see the propriety of not giving this money of the District to another."

August 18, 1884, this letter was referred to the First Comptroller for his consideration.

OPINION BY WILLIAM LAWRENCE, *First Comptroller.*

The question now presented is, what disposition shall be made of the surplus-proceeds of this and any future sale of the guarantee-fund bonds arising from investments under the acts of June 11, 1878 (20 Stat., 106); June 20, 1878 (*Id.*, 208); March 3, 1879 (*Id.*, 416) and March 3, 1879 (*Id.*, 410). As the law stood when the opinion of the Com-

troller on this subject was rendered April 25, 1884, said surplus-proceeds were required to be covered into the Treasury by virtue of section 3618 of the Revised Statutes to the credit of miscellaneous receipts, as proceeds of sales of public property, to await "a subsequent appropriation made by law." The question now is, has such appropriation been made, or has any statute been enacted, disposing of said surplus-proceeds otherwise than as required by section 3618 of the Revised Statutes? The act of June 30, 1884, "making an appropriation for the completion of the sewerage system of the District of Columbia," appropriates \$500,000, for completing the sewerage of the District—all to be paid from the Treasury of the United States by the Secretary of the Treasury out of said appropriation—and then provides, as follows:

"SEC. 4. That fifty per centum of the amounts so paid by the Secretary of the Treasury upon the warrants of the Commissioners of the District shall be charged to the said District, in the same manner that the cost of similar work is now charged: *Provided*, That one-half of *any unexpended balances of appropriations heretofore made* for the support of the Government of the District of Columbia, and any amounts of money in excess of appropriations which *have been* deposited by the District in the Treasury of the United States, may be applied by the Commissioners to the liquidation of the amounts so charged to the District, and any excess of money required to be charged to the District for the purposes of this act over the amounts so applied shall be advanced by the United States and be reimbursed with interest at the rate of four per cent. per annum, to the United States by the District in annual installments of not less than fifty thousand dollars, commencing with the fiscal year of eighteen hundred and eighty-five and eighteen hundred and eighty-six."

Under this act the District is to be charged with all moneys advanced by the United States, and with interest at four *per centum* per annum on the excess of advances over authorized credits. It becomes important, therefore, to the District, that it should have all proper credits at as early a date as practicable. In view of this, the act of June 30, 1884, authorizes credits to be given to the District from two sources. The *first* is "one-half of any unexpended balances of *appropriations heretofore made* for the support of the Government of the District of Columbia." In the opinion of April 25, 1884, it was said, in substance, that, if "unexpended balances of appropriations" made for the District were, under the act of June 20, 1874 (18 Stat., 110, sec. 5), "covered into the Treasury and carried to the surplus fund *and kept there*, it would be unjust to the tax-payers of the District, and Congress would undoubtedly re-appropriate such unexpended balances for the benefit of the District." Congress has, by the act of June 30, 1884, provided that the District shall have the benefit of one-half of said "unexpended balances" arising from appropriations "*heretofore made* for the support of the Government of the District of Columbia." This is manifestly just, since all these unexpended balances have arisen, one-half from taxes collected in the District, and one-half from the Treasury of the United States.

Thus, the question is presented, do the surplus proceeds, or profits, arising from the sale of the guarantee-fund bonds, constitute a part of "any unexpended balances of appropriations heretofore made"? It has already been shown that they do not (Guarantee-Fund case, *ante* —). "Unexpended balances of appropriations" consist of moneys *once appropriated*, but not used for, nor applied to, any purposes of such appropriations. The surplus-proceeds now in question *never were appropriated*. If Congress should by statute appropriate money to buy a lot of land for the District, and should in the same act direct that after five years this lot should be sold, and that a fixed sum should be paid from the proceeds of sale for a specified object, and if, when the sale was made, the proceeds realized should exceed such fixed sum, leaving a surplus, could it be said that this surplus was appropriated? To what object would it be appropriated? None whatever. It would simply go, by virtue of section 3618 of the Revised Statutes, to the credit of Miscellaneous Receipts from public property sold, to await "a subsequent appropriation made by law." The surplus proceeds now in question are precisely in this condition.

The Commissioners of the District evidently concur in this view, since they say in their letter of August 16, 1884, in relation to said surplus-proceeds, that they "*cannot be expended until appropriated by Congress.*" This is entirely correct, that is, money paid in to the credit of Miscellaneous Receipts is simply money in the Treasury to meet appropriations made or to be made by law. It is not kept as a fund separate and apart from other moneys in the Treasury.

The second source, from which the District is entitled to credit under said act of June 30, 1884, is therein described as "any amounts of money in excess of appropriations which *have been* deposited by the District in the Treasury of the United States." This expression, "any amounts of money," is sufficiently comprehensive to include, as the act of March 3, 1879 (20 Stat., 410), says, "all revenues of the District of Columbia from taxes or otherwise."

It is shown, in the opinion of April 25, 1884, that the District may sometimes have revenues, which do not arise from taxes on property or privileges; and the surplus-proceeds of guarantee-fund bond-sales were mentioned as such revenues. These revenues are required by the statute to "be deposited, to the credit of the Treasurer of the United States, in the Treasury" (Act March 3, 1879—20 Stat., 410). If any of these revenues had been deposited in the Treasury *prior to the date of the act of June 30, 1884*, they would be included in the expression in this act, "any amounts of money * * * which *have been* deposited by the District in the Treasury of the United States." As the former clause of said act covered "unexpended balances of [certain] appropriations," which include money derived from "taxes collected," the expression, "any amounts of money," embraces moneys derived from sources "otherwise" than from taxes, and so includes any surplus-proceeds of

guarantee-fund bond-sales, "which *have been* deposited by the District in the Treasury." But it will be observed, that the provisions of said act of June 30, 1884, both as to "unexpended balances of *appropriations*" and as to "any [other] amounts of money," are exclusively retroactive. These provisions apply only to "unexpended balances of *appropriations heretofore made* for the support of the Government of the District of Columbia," and only to "any [other] amounts of money * * * which *have been* deposited by the District in the Treasury of the United States."

But none of said surplus-proceeds were so deposited. The only deposit of such surplus-proceeds was that made *August* 11, 1884—after the passage of the act of June 30, 1884. No act has given authority to credit the District with the surplus-proceeds now in question, which have been, or may be, deposited *after* June 30, 1884.

It may be assumed, that Congress purposely omitted to give such authority for a valid reason. The surplus-proceeds arise from an investment in bonds purchased with money contributed, one-half by the United States, and managed by officers of the United States, one-half of whose salaries were paid by the Government. If the District should be credited with the whole of the surplus-proceeds, the United States would be required to contribute an equal amount, and would thus pay for the expenses of the District three times as much as the tax-payers therein, assuming that one-half of such surplus-proceeds equitably belong to the United States.

It may be proper to notice that credit may be given to the District under the act of June 30, 1884, for "unexpended balances" *heretofore* existing, or which may hereafter be ascertained, provided they arise from "appropriations *heretofore made* for the support of the Government of the District of Columbia." The act is comprehensive, and includes all such "unexpended balances," even though they may have been carried to the surplus-fund under the act of June 20, 1874 (18 Stat., 110, sec. 5). They may by warrant be carried from the surplus-fund to the credit of the District under the act of June 30, 1884.

The "unexpended balances" mentioned do not include those arising from "appropriations for interest and sinking-fund for the District." If the act of June 30, 1884, stood alone, it would do so. But it is *in pari materia* with the act of July 5, 1884; and both are to be construed together to ascertain the purpose of Congress. This latter act is entitled "AN ACT making appropriations to provide for the expenses of the Government of the District of Columbia for the fiscal year ending June thirtieth, eighteen hundred and eighty-five, and for other purposes." It appropriates money for various specified purposes of the District, and then, under the caption of "interest and sinking-fund," appropriates money "for interest and sinking-fund on the funded debt [of the District], exclusive of water bonds," and provides:—

"That any balances *now unexpended* of the appropriations for interest

and sinking-fund for the District of Columbia may be consolidated on the books of the Treasury Department, *and hereafter* any amount appropriated *for any fiscal year* may be consolidated with the unexpended balances of the appropriations for the *same purpose* for the years preceding."

It contains other provisions, all relating to the debt and bonds of the District. By a well settled rule these two acts are to be so construed, that the former shall not apply to the unexpended balances mentioned in the latter, thus leaving a distinct purpose for each (Huidekoper's case (Second), 3 Lawrence, Compt. Dec., 160). The latter act relates exclusively to unexpended balances of appropriations for "interest and sinking-fund." The last clause of the provision above quoted from said act is somewhat indefinite as to the appropriations to which it applies, but it is to be construed upon the maxim *Noscitur á sociis*. The whole provision relates only to unexpended balances of appropriations for "interest and sinking-fund." It gives no authority to apply any part of those as credits to the District under the act of June 30, 1884. It simply saves unexpended balances of "appropriations for interest and sinking-fund for the District," whether *now, hereafter, or theretofore* existing, from being "carried to the surplus-fund and covered into the Treasury" under the act of June 20, 1874 (18 Stat., 110, sec. 5). Such unexpended balances become permanent specific "appropriations for interest and sinking-fund for the District of Columbia." The fair construction of the statute is, that said balances, if they continue to exist for three years, do not again become subject to the surplus-fund act.

The Commissioners of the District, in their letter of August 16, 1884, say, that the Secretary "will see the propriety of not giving this money [the surplus-proceeds of guarantee-fund bond-sales] * * * to another." When "this money" is carried to the credit of "Miscellaneous Receipts," as proceeds of sales of public property, to await "a subsequent appropriation made by law," as required by section 3618 of the Revised Statutes, it is not *given to another*. It is disposed of as the law requires. It is subject to the control of Congress, and this right of Congress to dispose of it cannot be taken away by any officer of the Government.

The letter of the Commissioners further says, with reference to said surplus-proceeds, that it is "important to have it placed to its [the District's] credit in the Treasury, *whether appropriated or not*." The *importance* of giving the District credit, cannot confer the power to do what the law has not authorized. No law has authorized such credit. On the contrary, Congress, in the act of June 30, 1884, expressly limited the authority, as to the sources from which to give credits, to "one-half of any unexpended balances of *appropriations heretofore* made for the support of the Government of the District of Columbia," and to "any amounts of money in excess of appropriations which *have been* deposited by the District in the Treasury." If this act had been made *prospective*

in its operation, as was the act of July 5, 1884, credit might be given. But Congress did not so make it.

The Secretary of the Treasury will be advised accordingly.

TREASURY DEPARTMENT,

First Comptroller's Office, August 21, 1884.

IN THE MATTER OF THE RIGHT OF A POSTMASTER OR LATE POSTMASTER, IN WHOSE FAVOR A BALANCE HAS BEEN, UNDER THE ACT OF MARCH 3, 1883 (22 STAT., 487), CERTIFIED BY THE AUDITOR OF THE TREASURY FOR THE POST-OFFICE DEPARTMENT, TO APPEAL FROM AN OPINION OF SUCH AUDITOR THAT THERE IS NO APPROPRIATION FOR THE PAYMENT OF SUCH BALANCE.—GRIGG'S APPEAL.

May 14, 1884, the Postmaster-General ordered a readjustment, under the act of March 3, 1883 (22 Stat., 487), of the salary of a late postmaster, finding due the latter \$160. May 15 the Auditor of the Treasury for the Post-Office Department certified a balance due the late postmaster of said sum.

No application was made to the Postmaster-General for the issuing of a *warrant* or *collection draft* to pay said sum, but the Auditor, when requested to pay the same, expressed the opinion that there was no appropriation available to make payment, and refused to take further action for that purpose. The claimant appealed to the First Comptroller. May 22 the Auditor, by letter to the Comptroller, asserted that there was no available appropriation.

Held:

1. In this condition of the case no appeal lies to the First Comptroller.

The act of March 3, 1883 (22 Stat., 487), authorizes and directs the Postmaster-General on application to readjust the salaries of postmasters of the third, fourth, and fifth classes previously in office, as therein prescribed, and then declares:

"That each payment made shall be by warrant or check on the Treasurer or some assistant treasurer of the United States, made payable to the order of said applicant, and forwarded by mail to him at the post-office within whose delivery he resides, and which address shall be set forth in the application above provided for."

May 14, 1884, the Postmaster General readjusted the salary of A. L. Grigg, late postmaster at Auburn, Alabama, from August 16, 1871, to June 30, 1872, showing him "entitled to \$160 additional compensation for the period named." May 15, 1884, the Auditor of the Treasury for the Post-Office Department stated an account with said Grigg, showing said sum of \$160 certified to be due him. May 15, 1884, Harvey Spalding, attorney for Grigg, addressed a letter to the First Comptroller, saying:

"I have requested Hon. J. H. Ela, Auditor P. O. Dept., to pay the same agreeably to said act. The Auditor declines such payment, on the ground that no provision for such payment is provided by existing law. From the Auditor's decision I respectfully appeal to you."

May 22, 1884, the Auditor addressed a letter to the First Comptroller, saying:

"I hold that the act of March 3, 1883, 'authorizing and directing the Postmaster-General to readjust the salaries of certain postmasters,' &c., does not contain an appropriation. The last proviso of the act is limited in its scope to the form and method of payment, like sections 3674 and 3861 Revised Statutes.

If it is held that the amount due is a proper charge against the appropriation 'for compensation to postmasters,' in the act making appropriations for the fiscal year ending June 30, 1884, Statutes, vol. 22, chap. 92, page 453, that appropriation is undoubtedly exhausted, although its condition cannot yet be shown on my books. Judging from the account for the first six months of the current year, the sum which has accrued to postmasters as compensation, and been withheld by them to date, under section 3861 Revised Statutes, will indeed exceed the amount appropriated.

The appropriation for the fiscal year 1872, during which the service to be paid for was rendered, is, of course, no longer available."

Harvey Spalding, for the claimant, submitted an argument.

The action of the Postmaster-General in prescribing salary is conclusive on the executive and judicial departments. (*McLean's case*, 95 U. S., 750.) The salaries readjusted under acts of July 1, 1864 (13 Stat., 335), and June 12, 1866 (14 Stat., 60), upon the basis of the commissions prescribed by prior laws were paid in full each year out of annual appropriations. The credit of \$160 for the claimant never existed until in the current fiscal year. It should be paid from the appropriation for the present year in which it becomes a charge against the Government. All postmasters heretofore have been paid at the time they were entitled to credit. Section 3 of the act of March 3, 1879 (20 Stat., 362), gave compensation for previous service. Payments were made from the appropriations for the fiscal year ended June 30, 1880, to Lucien Buttles, Mobile, John Maher, Old Point Comfort, and to others. The act of May 17, 1882 (22 Stat., 29), authorized the Postmaster-General to credit postmasters with losses for fifteen years prior thereto. These have been and are being paid from current appropriations. The claimant in this case never had any claim to be allowed under section 4 of the act of June 14, 1878 (20 Stat., 130).

DECISION BY WILLIAM LAWRENCE, First Comptroller.

The Revised Statutes contain the following section:

SEC. 270. Whenever the Postmaster-General or any person whose accounts have been settled by the Sixth Auditor is dissatisfied with the settlement made by the Auditor, he may, within twelve months, appeal to the First Comptroller, whose decision shall be conclusive.

The settlement made by the Auditor of the Treasury for the Post-Office Department gives the claimant all he asks. The Auditor has certified a balance in his favor for \$160. From that no appeal has been taken. There is no record evidence of any *decision* made by the Audi-

tor on the question whether there is an appropriation available for the payment of the claim in this case, though the letter of the Auditor to the Comptroller, dated May 22, 1884, may be considered as the expression of an opinion on the subject. Even if there could be an appeal from any final action or refusal to act by the Auditor on this subject, there has been no such final action or refusal. The Revised Statutes provide as follows :

"SEC. 3674. Payments of money out of the Treasury on account of the postal service shall be in pursuance of appropriations made by law, by warrants of the Postmaster-General, registered and countersigned by the Auditor for the Post-Office Department, and expressing on their face the appropriation to which they should be charged.

"SEC. 3861. The salary of a postmaster, and such other expenses of the postal service authorized by law as may be incurred by him, and for which appropriations have been made, may be deducted out of the receipts of his office, under the direction of the Postmaster-General.

"SEC. 3862. Vouchers for all deductions made by a postmaster out of the receipts of his office, on account of the expenses of the postal service, shall be submitted for examination and settlement to the Sixth Auditor, and no such deduction shall be valid unless found to be in conformity with law."

It is clear that, under section 3674, the Auditor cannot act, or refuse to act, or make any final decision affecting the payment of a balance certified by him to be due, until the Postmaster-General has issued a warrant for payment, and it is presented to him to be countersigned and registered. (Rev. Stat., 277, cl. 7.) That point has not yet been reached in this case. (See 1 Lawrence, Compt. Dec., 2d ed., *Introd.*, IX; *Id.*, 490.)

Many payments are made in the postal service by "collection drafts" or "transfer drafts"—that is, by drafts payable to the order of claimants drawn by the Postmaster-General on postmasters of specified classes and countersigned by the Auditor. (Postal Regulations of 1879, Ch. v, p. 299, secs. 1191-1200.) But there can be no final action, or refusal to act as to these, until they are signed by the Postmaster-General. There is no final action of the Auditor from which any appeal can be taken.

The claimant will be advised accordingly.

TREASURY DEPARTMENT,

First Comptroller's Office, June 2, 1884.

IN THE MATTER OF THE RIGHT OF THE CRIER OF A COURT, WHILE RECEIVING PAY AS SUCH, TO BE ALSO PAID FOR HIS SERVICES AS BAILIFF.—CRIER-BAILIFF CASE.

1. The crier appointed by a court under section 715 of the Revised Statutes is an officer; a bailiff appointed by a marshal under the same section is not an officer.
2. The provisions of section 1765 of the Revised Statutes, as construed in the case of *Converse v. United States* (21 How., 463), do not prohibit such crier from acting as bailiff and from receiving the compensation fixed by law for both positions.
3. *Rheem's case* (3 Lawrence, Compt. Dec., 305) re-affirmed.
4. But the right to such dual compensation is denied by section 3 of the act of June 20, 1874 (18 Stat., 109).
5. On general principles an officer cannot be paid compensation beyond his lawful salary for discharging the duties of his office, or duties connected with, in the line of, or incidental to, his office.
6. The case of *United States v. Morse* (3 Story, 91) considered.

March 23, 1884, Z. L. Tidball, United States Marshal of the District of Arizona, addressed a letter to the Attorney-General, saying that:

"It is a difficult matter sometimes to obtain competent persons * * * to serve as bailiffs and criers of the courts in this Territory; the amount allowed by law, viz: \$2 per day [for each], being inadequate to secure the services of such men as ought to be employed."

And said marshal inquires whether there is any objection to his employing "an acceptable person in the dual capacity of bailiff and crier, and paying him the amount allowed for each position?" March 29, 1884, this letter was, by the Attorney-General, "referred to the First Comptroller * * * for the proper reply."

OPINION BY WILLIAM LAWRENCE, *First Comptroller*.

As the accounts of the Marshal, as a disbursing officer, must come to the First Comptroller for final decision, it is proper that an opinion should be given on the question submitted. The Revised Statutes contains the following provision:

"SEC. 715. The circuit and district courts may appoint criers for their courts, to be allowed the sum of two dollars per day; and the marshals may appoint such a number of persons, not exceeding five, as the judges of their respective courts may determine, to attend upon the grand and other juries, and for other necessary purposes, who shall be allowed for their services the sum of two dollars per day, to be paid by and included in the accounts of the marshal, out of any money of the United States in his hands. Such compensation shall be paid only for actual attendance, and, when both courts are in session at the same time, only for attendance on one court."

Under this section the proper court may appoint a *crier*; the marshal may appoint a *bailiff*. The *crier* is an officer, the *bailiff* is not. (*United*

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States v. Germaine, 99 U. S., 511; *Meigs's case*, 4 Lawrence, Compt. Dec., 608.) The compensation of each is fixed in amount by law. The Revised Statutes also contains this provision :

"SEC. 1765. No officer in any branch of the public service, or any other person whose salary, pay, or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation."

The question now presented is whether a *crier*, while receiving pay as such, can, by performing the duties of a *bailiff*, receive the compensation fixed by law for the latter service? It is clear that section 1765 of the Revised Statutes says that he cannot, unless [1] the service "is authorized by law, and [2] the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation." In this case the service of *bailiff* "is authorized by law"; but the appropriation for the payment thereof does *not* explicitly, or in any form, state that it is for "additional pay, extra allowance, or compensation" to any person who may be crier. It has been said, that, in construing a statute, "*every word* and clause should, if possible, have assigned to it a meaning, leaving no useless words" (Bishop, Written Laws, 82, citing numerous authorities). The effect of this rule, when applied to the present case, is, that the crier cannot be paid for services as bailiff, because the appropriation therefor does not state that it may be so applied. In the case of *Converse v. United States* (21 How., 463), it was held that a person holding an office might be appointed to render a service outside of, and alien to, the office which he held, and might be paid the compensation "*fixed by law*" for this service; but that such person for such service could not be paid compensation allowed or fixed in the *discretion* of a superior officer appointing him. That case was so strongly in opposition to the plain words of the statute prohibiting dual compensation, that Attorney-General Black said, in advising the Secretary of State in a case involving the right to extra compensation, "I shall not advise you to stretch it [the decision in *Converse v. United States*] a single inch" (9 Op. Att.-Gen., 509; *Meigs's case*, 4 Lawrence, Compt. Dec., 588, 620). *Following this advice*, *Rheem's case* (3 Lawrence, Compt. Dec., 305) was decided, with knowledge of *Converse v. United States* (21 How., 463), upon what was believed to be the true construction of section 1765 of the Revised Statutes. In *Rheem's case* it appeared that the act of March 3, 1881 (21 Stat., 464), made an appropriation to pay a fixed annual compensation to one *Secretary* to the Board of School Trustees of the District of Columbia, and also a fixed annual compensation to one *Clerk* to the Superintendent of Public Schools in said District. Said *Secretary* and *Clerk* were appointed by the Commissioners of the District of Columbia, and, hence, were not technically *officers*—they were *employés*. The question decided in that case was, that *one*

person performing the duties of such Secretary and Clerk was prohibited by section 1765 of the Revised Statutes from receiving the compensations attached to the two positions. The case of *Converse v. United States* only decided that one person holding two offices, or an office and an agency, could receive the compensations of both places when they were *fixed by law* and not by the *discretion* of some officer. It would require the decision in that case to be stretched at least "*a single inch*" to extend it to Rheem's case, in which *one person* claimed the compensations of *two unofficial positions* or employments. This is absolutely prohibited by section 1765 of the Revised Statutes; and if its clear terms are to be construed as not applying in such case as that of Rheem's, it may properly be left to courts to so construe it. Rheem's case may be sustained also by section 3 of the act of June 20, 1874 (18 Stat., 109), which uses the word "*officer*" in a sense sufficiently comprehensive to embrace the employes to which said case applies. Since then the Supreme Court, in *United States v. Brindle* (110 U. S., 688), referred to the case of *Converse v. United States* (21 How., 463), and to a certain extent approved it, but without referring to section 1765 of the Revised Statutes, and without deciding any question like that now under consideration. This has been shown in Meigs's case (4 Lawrence, Compt. Dec., 588, 623, 634). It may be said, that if the question in this case now under consideration stood alone upon the authority of *Converse v. United States* (21 How., 463), the crier could be appointed bailiff, and could receive the compensations attached to the two places. But the right to such dual compensation is denied by section 3 of the act of June 20, 1874 (18 Stat., 109), as follows:

"That no civil officer of the Government shall hereafter receive any compensation or perquisites, directly or indirectly, from the Treasury or property of the United States beyond his salary or compensation allowed by law: *Provided*, That this shall not be construed to prevent the employment and payment by the Department of Justice, of district attorneys as now allowed by law for the performance of services not covered by their salaries or fees."

This section in clear terms prohibits an officer from receiving "any compensation or perquisites, directly or indirectly, from the Treasury or property of the United States beyond his salary or compensation allowed by law." A crier is an *officer*; he has a fixed salary. If he also receives the additional pay of a bailiff, who is not an officer, does not the former receive compensation from the Treasury "beyond his salary or compensation allowed by law" to him as crier? To affirm that he does not, is simply to disregard the plain meaning of the words employed in the statute. Such dual compensation cannot be paid without giving a forced construction to the statute, or without an absolute abuse of words.

1. It cannot be said, that the act of June 20, 1874 (18 Stat., 109, Sec. 3), was only designed to prohibit compensation beyond salary *for the performance of the duties of an office*, or of duties connected with and in

the line of an office. No statute is necessary for this purpose. No officer can be paid compensation beyond his lawful salary for discharging the duties of his office, or duties connected with and in the line of his office. This is well settled on general principles.

Thus, in *Goldsborough v. United States* (Taney's Dec., 88), decided by Chief-Justice Taney in 1840, it appeared, that Goldsborough, an acting purser in the Navy, having a salary fixed by law, and holding no other office, disbursed money in 1835 and 1836, and claimed a commission of 2½ per cent. thereon for his services, under a regulation of the Navy Department expressly allowing it. The Chief-Justice, in deciding the case, said that :

“Where an act of Congress declares that an officer of the Government, or public agent, shall receive a certain compensation for his services, which is specified in the law, undoubtedly, that compensation can neither be enlarged nor diminished by any regulation or order of the President, or of a department, unless the power to do so is given by act of Congress.

In the case before me, the commission is claimed as a part of the compensation to which the deceased was entitled as acting purser, for services rendered in the ordinary line of his official duty. Now the compensation to a purser for services of that description is fixed by the act of Congress of 13 April, 1814, ch. 143, which declares that a purser shall receive \$40 per month and two rations a day ; it is the same compensation which was given by the acts of 17 March, 1794, ch. 12, sect. 6, and 1 July, 1797, ch. 7. And when the law declares that, for certain services, he shall receive \$40 per month and two rations per day, by what authority can the head of a department allow him more ? The same act of Congress, and the same section that fixes the compensation of a purser, fixes also the compensation of lieutenants, chaplains, sailing masters, surgeons, and various other officers in the Navy, by giving them a certain sum per month, and a certain number of rations per day. It never has been supposed that the Secretary of the Navy was authorized to increase the compensation of these officers, by enlarging their monthly allowance, or adding to the number of their daily rations ; and when the compensation to the purser is fixed by the same law, and in language precisely the same, how can his case be distinguished from that of the other officers named in the law ? How can the Secretary increase his compensation by enlarging his monthly allowance, or adding to the number of his daily rations ? And if he cannot do it in this mode, by what authority, or upon what distinctions, can he do it, in the shape of commissions, when no such commissions are given by law ? The court can see no ground whatever for distinguishing the case of a purser from that of any other officer mentioned in the act of Congress ; and as the Department is bound by the allowance fixed for them, it is equally bound by that fixed for a purser.

Indeed, the objection to the allowance is made still stronger by the provisions of the second section of the act of 1814, which authorizes the President to make an addition, not exceeding 25 per cent., to the pay of the officers, petty officers, midshipmen, seamen, and marines engaged in any service, the hardships or disadvantages of which shall, in his judgment, render such an addition necessary. The power given to make this addition, by necessary implication, excludes the power of making any other or greater addition, or under any other circumstances than those mentioned in this section ; and if such a power could have been

supposed to exist, in cases where the law merely fixes the compensation, and says nothing further, yet the well-established rules for the construction of statutes would exclude it in the present case.

It has, however, been argued that a purser is neither a commissioned officer nor a warrant officer, and is not so regarded in the Navy, and that, therefore, the provisions in the second section of the act of 1814 do not apply to him. In other words, it is insisted that the purser does not come within the description of an *officer*, and, consequently is not included in the number of persons to whom the President is authorized to make the limited increase of compensation specified in the section.

It would be a sufficient answer to this argument to say, that the compensation of the purser is, undoubtedly, specified in the law, and he is, therefore, within the general principle before stated. But the second section applies to the allowance claimed in this suit with as much force as it would to the increase of the pay and emoluments of any other officer mentioned in the first section; for, whether a purser is regarded in the Navy as a commissioned officer, or a warrant officer, or neither, it is very certain that he is always included under the description of an *officer*, in the acts of Congress which fix his compensation. Thus, in the act of 27 March, 1794. ch. 12, the sixth section declares, 'that the pay and subsistence of the respective *commissioned and warrant officers*, be as follows'; it then proceeds to specify their compensation, from the captain down, and the *purser* is mentioned among them."

When the services in the above case were performed, there was no statute against dual salaries or extra compensation. Those services antedated the statutes from which sections 1763, 1764, and 1765 of the Revised Statutes were taken. And Chief-Justice Taney distinctly announced that no compensation in addition to the salary prescribed by law could be paid to the claimant "*for services rendered in the ordinary line of his official duty.*"

In addition to this, at common law it is extortion, and, so, a crime, for an officer, under "color of his office," to take "any money or thing of value that is not due to him, or more than is due, or before it is due" (4 Blackst. Com., 141; 1 Russell, Crimes, 142; *Extra-Fee case*, 4 Lawrence, Compt. Dec., 427; *Martin v. The State*, 1 Har. & J., 740).

It is thus rendered certain that there is no legal foundation to support the remark of Justice Story in *United States v. Morse* (3 Story, 91), that in the "legislation upon the subject of compensation of officers," the "great object of the legislature" was "to prevent and suppress the growing evil of extra compensation claimed for services *purely incidental* to a single office." For that object no legislation was necessary. One of the evident purposes of such legislation has been, to prevent *officers* from securing compensation for services *not incidental* to any office held by them. This subject is somewhat discussed elsewhere. See *Contempt case* (*post*, 255; *Bliss's case ante*, 38).¹

2. The same result follows from a rule of construction—*generalalia verba sunt generaliter intelligenda*—general and unqualified words must receive a broad and comprehensive construction (Broom, Legal Max., 647). The act of June 20, 1874 (18 Stat., 109, sec. 3), says in absolute and

unqualified terms that "no civil officer * * * shall * * * receive any compensation or perquisites, * * *, beyond his salary or compensation allowed by law." If Congress could have intended to make the *unnecessary* and *absurd* provision, that an officer shall only be paid for performing his official duty the compensation fixed by law, apt words would have been used to *limit* the above provision, accordingly, to compensation for the performance of official duties. But when *no such limitation* is made in the act of June 20, 1874, it must, as its terms require, prohibit compensation for *all services not attached to the duties of the office* held by the claimant, as well as prohibit extra compensation for those services which are attached, and certainly so, when, as in this case, the services of bailiff do not pertain to an *office* at all.

3. Another rule of construction leads to the same result. The provisions of an act are to be construed in the light of the maxim, *noscitur à sociis*. The *proviso* to section 3 of the act of June 30, 1874 (18 Stat., 109), shows the sense in which Congress understood the prior part of the section. This *proviso* declares that the prior provision of section 3 shall not prevent the employment and payment of district attorneys for *the performance of extra official services—services not pertaining to their offices*, or, as the proviso says, "services not covered by their salaries or fees" (Bliss's case, *ante*, 38). Thus, it is clear, that, without the *proviso*, a civil officer cannot be paid for performing services not pertaining to any office. Hence, a crier, who is an officer, cannot be paid for performing the unofficial services of a bailiff.

The *proviso* makes *one exception*, in which district attorneys may be paid for the performance of extra official services, as said *proviso* says, and as Congress understood, "as now allowed by law." When only *one exception* is expressly made, there is an implication that *no other exception* arises. *Expressio unius est exclusio alterius*. Congress thus says, that there may be *one class* of salaried officers, who may, "as now allowed by law," be paid for extra official services, but that there can be no other. In other words, Congress in effect says, that every officer (except district attorneys), who, "as now allowed by law," can receive compensation for extra official services, can no longer receive it. The "now allowed by law" is repealed, except as to district attorneys. The law is simply a declaration of the legislative will (Bliss's case, *ante*, 38). And the legislative will, as declared by Congress, is as stated. There is, of course, the exception recognized in *United States v. Brindle* (110 U. S., 688), and in Meigs's case (4 Lawrence, Compt. Dec., 634), that a salaried officer may receive compensation for services not in the line of his official duty, when such compensation is to be paid, not "from the Treasury or property of the United States," but by a foreign government, or under a foreign law, or from a fund in which the United States is in no way interested. And—again, *noscitur à sociis*—the act of June 20, 1874 (18 Stat., 101), in *another provision* shows that Congress intended, gen-

erally, to cut off all compensation for extra services. This provision is as follows :

"And hereafter it shall be unlawful to allow or pay to any of the persons designated in this act any additional compensation from any source whatever, or to retain, detail, or employ in any branch of the War Department in the city of Washington any persons other than those herein authorized except in the Signal-Office and the Engineer Corps, and except such commissioned officers as the Secretary of War may, from time to time, assign to special duties."

If it be said that the *proviso* to section 3 of the act of June 20, 1874, was inserted, *ex abundanti cautela*, to avoid *all question* as to the right of district attorneys to compensation for extra official services, it may also be said, that, if Congress intended *other officers* to retain the right, as then "allowed by law," to receive such compensation, provision would have been made accordingly, *ex abundanti cautela*.

4. One of the purposes of the third section of the act of June 20, 1874 (18 Stat., 109), is, to prevent *one person* from monopolizing, in addition to the benefit of an office, the advantage of other official service. Sound policy and justice require the distribution of public favors. The dual compensation now in question is small, but the principle involved, if resolved in favor of it, will create great abuses. And statutes should be construed to prevent abuses, when this can be done consistently with their words. This subject has been elsewhere considered, and the reasoning there presented need not be repeated (Meigs's case, 4 Lawrence, Compt. Dec., 588). The question thus far considered is, whether the *crier* of a court, while receiving pay as such, can also be paid the compensation of a *bailiff*? The conclusions reached thereon cannot be affected, nor can a different result be attained by reversing the question—can a *bailiff*, while receiving pay as such, be lawfully paid the compensation of a *crier*? The *bailiff must be a crier*, before he can be paid the salary of such officer. When he is such, the question is resolved back to the original one—can a *crier*, while receiving pay as such, be also paid the compensation of a *bailiff*?

The statutes, which have been enacted to prohibit dual compensation, necessarily encounter the opposition of a portion of that large, useful, and *influential* class of citizens—office holders and public employes. Sound policy requires that no inducement should be held out to them to neglect official duty, by devoting their time to other public service, or in seeking for it. The desire to obtain one office may sometimes be followed by a wish to obtain at least one more; and these having been secured with a right to the salary of both, whether the duties of either are performed or not, it may be an evidence of energy to obtain compensation for rendering other and unofficial services, procured, sometimes, at a great sacrifice of time and by the aid of potential "influence"; but this is not evidence of devotion to official duty. It is a kind of "civil service reform" which has received all the encouragement

it deserves. The construction heretofore given to the statutes against dual compensation does not confine this kind of "civil service reform" within very narrow bounds (*Converse v. United States*, 21 How., 463; *Meigs's case*, 4 Lawrence, Compt. Dec., 612). Still, in full view of the encouragement given by law, as construed by the courts, to dual salaries and extra compensation, the great public, who is thereby in a large measure excluded from the benefits of office and public place, has some rights which are to be respected. This public is in theory so respected at least by elective officers before elections. If elective officers cannot make laws to distribute the benefits of official position, it may be their misfortune. If they do make them sufficiently clear, and they are not enforced, the mistake or fault is elsewhere. Words are not very potent factors in accomplishing this object, unless used with proper skill and in sufficient abundance (*Converse v. United States*, 21 How., 463; *Meigs's case*, 4 Lawrence, Compt. Dec., 612; *Bliss's case*, *ante* 38). The *proviso* to the act of September 30, 1850 (9 Stat., 542), prohibiting the accounting officers from paying "to one individual the salaries of two different offices on account of having performed the duties thereof at the same time," was never expressly repealed, but fell by a repeal by implication, which latter was so apparent that the *proviso* did not find a place in the Revised Statutes (*Major Collin's case*, 15 Ct. Cl., 37). Repeals by implication are not always and equally under the ban of disfavor. If the *proviso* to section 3 of the act of June 20, 1874 (18 Stat., 109), does not have the effect above stated, and was not designed to accomplish any general purpose, it can soon be known by the decision of the proper judicial tribunal. If there be doubt as to this, it is better now to hold that a *crier*, while receiving pay as such, cannot be paid for performing the duties of a *bailiff*, and this construction, if wrong, can be corrected in some case involving the same or a similar question. But, if it should now be held that the *crier can be paid* for performing the services of a *bailiff*, and this construction should be erroneous, and if the same principle should be generally applied, and this should be a wrong construction, there would be no mode of correcting the error.

The marshal will be advised that one person cannot be appointed *crier* and also *bailiff*, and paid the compensation prescribed by law for each.

TREASURY DEPARTMENT,

First Comptroller's Office, June 5, 1884.

IN THE MATTER OF THE RIGHT OF THE CHIEF CLERK IN THE OFFICE OF THE COMMISSARY-GENERAL OF SUBSISTENCE OF THE WAR DEPARTMENT TO RECEIVE COMPENSATION FOR EXTRA SERVICES UNDER THE JOINT RESOLUTION OF MARCH 3, 1883 (22 STAT., 640).—EXTRA-PAY CASE.

1. Acts of Congress, decisions of the courts, and opinions, relating to extra compensation, and to compensation for extra services, to salaried officers, reviewed.
2. Under section 1765 of Revised Statutes, a person who is a salaried officer may be paid compensation for extra services not in the line of his or any other officer's official duty, if (1) the extra services are authorized by statute (2), the statute designates such salaried officer to render them, and (3) the compensation therefor is fixed in the manner specifically authorized by said statute.

The "Centennial International Exhibition" of 1876 at Philadelphia was authorized and aided by sundry acts of Congress (Decoration case, 2 Lawrence, Compt. Dec., 2d ed., 76). William A. DeCaindry was employed and served as secretary of the Board on behalf of the United States Executive Departments at said Exhibition from June 1, 1875, to the closing up of the affairs of said Board, and was paid for his services, but held no office under the Government during that period. July 1, 1879, he was appointed chief clerk in the office of the Commissary-General of Subsistence of the War Department, with an annual salary of \$2,000, and has held that office ever since.

The joint resolution of March 3, 1883 (22 Stat., 640), provides:—

"That there be printed and bound, in continuation of the series of volumes heretofore published by Congress under joint resolution of June twentieth, eighteen hundred and seventy-nine, containing the final report of the United States Centennial Commission on the International Exhibition of eighteen hundred and seventy-six, and uniform therewith, five thousand copies of the report of the Board on behalf of the United States Executive Departments at said Exhibition, being the report which was submitted to Congress by the President of the United States, by special message of February ninth, eighteen hundred and seventy-seven, and again in his annual message of December third, eighteen hundred and seventy-seven, of which number three thousand copies shall be for the House, one thousand copies for the Senate, two hundred copies for the Smithsonian Institution for distribution to such foreign governments and others as made contributions from such exhibition to the National Museum, three hundred copies for the late members of said Board, and five hundred copies for distribution by the late President of the Centennial Commission, the printing to be done by the Public Printer, *under the supervision of the late chairman of said Board, upon whose order may be allowed by the Public Printer to the late secretary of the Board not exceeding three hundred dollars for services to be performed, and incidental expenses to be incurred in connection therewith.*"

June 24, 1884, DeCaindry presented to the Public Printer for payment a bill, as follows:—

"The United States to Wm. A. DeCaindry, Dr.

June 24, 1884, for *services performed and incidental expenses incurred* in connection with the publication of the report of the Board on behalf of United States Executive Departments at the International Exhibition, 1876, viz: revising and arranging the MSS. of the report for publication; preparing drawings and illustrations for reduction to 8vo. size; supervising and approving engraving and photolithographing; reading and correcting proofs, and revises of the two volumes of the report, and making index \$300 00
Approved:

S. C. LYFORD,

Brt. Lieut. Col. U. S. A., late Chairman of Board on behalf U. S. Executive Depts. at Int'l Exhn. 1876."

July 19, 1884, the "late chairman", &c., made an "order", that the Public Printer pay said DeCaindry \$300 for "services performed and incidental expenses—approved bill for which has heretofore been rendered, which is supplemented by his affidavit of July 18, 1884, herewith." Said affidavit of DeCaindry states that:—

"In connection with the work of publication of the report * * * under joint resolution of March 3, 1883, he used at his own expense in going to and returning from the Army Medical Museum, the Department of Agriculture, and the Government Printing Office, not less than forty-eight street-car tickets of the value of two dollars."

July 1, 1884, the Public Printer by letter asked the First Comptroller whether the claim of DeCaindry could lawfully be paid.

July 19, 1884, *William A. DeCaindry*, the claimant, submitted a brief, as follows:—

"The occasion of my selection for the work will be found in House Miscellaneous Document No. 20, 2d session, 47th Congress, in which Prof. Spencer F. Baird, the Secretary of the Smithsonian Institution, recommends the adoption of a joint resolution in the form of that of March 3, 1883.

The report of the Government Board at the International Exhibition of 1876, remained in the legislative hands of Congress, without being printed from the year 1877 to the year 1882. In August of the latter year the report was referred by resolution of the House to Prof. Baird for his examination. I was consulted by him on the subject of the work of reducing the matter of the report, and the resolution suggested by him to Congress shows that it was contemplated that I under the supervision of the late chairman of the board should do the work. The resolution contemplated my paying my own expenses in connection with the work. The joint resolution of March 3, 1883, became a statutory contract, so far as I was concerned, and shortly after its approval I had the manuscript of the entire report, together with the drawings and illustrations, delivered at my dwelling house, where before and after office hours in the War Department I devoted my time to the work of carrying out under the direction of the late chairman of the

board the plan of Professor Baird. My right to compensation is not denied by section 1765 of the Revised Statutes.

I have consulted the cases reported in the three volumes of Decisions of the First Comptroller, and find that, with the exception of the Richardson case in the first volume [p. 357], all the cases in which this section was considered to be a bar were cases where executive officers and judicial officers had of their own authority and not [of] that of Congress granted or attempted to grant extra compensation out of appropriations under their control, for extra services rendered by Government officers. The conclusions of the Comptroller in all such cases are fully concurred in by me; but they are of no validity as against an act of Congress which authorizes the services, designates the officer to perform them, and makes an appropriation for payment specifically to him, which is the case now before the Comptroller.

If emphasis be placed upon the fact, that Congress has not in my case followed the verbiage of the concluding condition of section 1765, to wit: that the appropriation in cases of additional services must state that it is for such additional pay, extra allowance, or compensation; it is answered that this rule is not observed in legislative practice. See Joint Resolution of June 7, 1880—21 Stat., 308; Act of March 3, 1881—*Id.*, 442; Act of [June 16, 1880]—*Id.*, 281, in the case of Charles H. Evans; [Act of August 5, 1882]—22 Stat., 260, case of Herbert A. Gill; [Act of August 5, 1882]—*Id.*, 274, case of Thomas J. Hobbs; [Act of March 3, 1883]—*Id.*, 594, case of Charles H. Evans. * * *

OPINION BY WILLIAM LAWRENCE, *First Comptroller.*

There is probably no one section of the Revised Statutes which has given rise to so many questions as section 1765. This is shown by the volumes of opinions of the Attorneys-General, by the Reports of the Court of Claims, by the Decisions of the First Comptroller, and by numerous cases which are buried in the files and records of the Executive Departments. These prove that officers and employes in the public service, having compensation fixed in amount by law, sometimes display wonderful skill, not infrequently with success, in seeking to obtain additional compensation. The general rule, in legal contemplation, and in fact, seems to be, that the salary of an officer fixed by law is, as the Attorney-General has said, "*a full consideration for the whole of his time*" (15 Op. Att.-Gen., 536).

Some of the many and manifest evils of permitting salaried officers to procure extra compensation, and compensation for extra services, have been elsewhere pointed out; and it is unnecessary to repeat them now (Meigs's case, 4 Lawrence, Compt. Dec., 627). It was graphically said by Attorney-General Black, in reviewing the acts of Congress designed to prevent double compensation in any form, that:—

"It cannot be denied that the policy which dictated these provisions is founded on just notions of public and private morality. Plurality of offices, and extra allowances to those who hold them, are the vices of a bad government, and have always prevailed to the greatest extent in the worst times" (9 Op. Att.-Gen., 126).

It was in view of these considerations that repeated acts of Congress have been passed to prohibit the allowance of such compensation; but these acts have not been eminently successful. Undoubtedly, there are cases, in which, as in this case, the public interest may be subserved by securing the special skill of a person who holds a salaried office, in rendering services not pertaining to the duties of his office, for which services he may be justly entitled to compensation, as is the faithful and efficient officer who is now the claimant. But it may be supposed that the cases must generally be rare, in which a salaried officer can, consistently with the duties of his office, be engaged to render other services. To prevent the evils mentioned the act of March 3, 1839 (5 Stat., 349, sec. 3), provided that:—

“No officer in any branch of the public service, or any other person whose salaries, or whose pay or emoluments is or are fixed by law and regulations, shall receive any extra allowance or compensation in any form whatever for the disbursement of public money, or the performance of any other service, unless the said extra allowance or compensation be authorized by law.”

This was found ineffectual, and the act of August 23, 1842 (5 Stat., 510, sec. 2, now Rev. Stat., 1765) provided that:—

“No officer in any branch of the public service, or any other person whose salary, pay, or emoluments, is or are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatsoever, unless the same shall be authorized by law, *and the appropriation therefor explicitly set forth that it is for such additional pay, extra allowance, or compensation.*”

See Rev. Stat., 170.

The substantial change made in the former by this latter act was the addition of the words, “*and the appropriation therefor explicitly set forth that it is for such additional pay, extra allowance, or compensation.*” The manifest purpose of this addition would seem to be to require Congress to “*explicitly set forth*” when, in making appropriations, extra or double compensation was being provided for, and, thus, to prevent a surprise, or provision for extra compensation or for compensation for extra services without express knowledge of the facts to enable Congress to act understandingly. This was a wise precaution, since, otherwise, extra compensation might be authorized without the knowledge of Congress. As a matter of fact, members of Congress cannot know all the subordinate officers of the Government; and it may well be doubted whether the law presumes such knowledge (1 Greenleaf, Ev., § 6; 1 Wharton, Ev., § 325). Hence, a statute like the joint resolution of March 3, 1883 (22 Stat., 640), authorizing payment for services “to the late secretary of the Board” specified, would not give any indication of Congressional intention to make provision for extra compensation, or for compensation for extra services, to an officer already in the receipt of an annual salary. The purpose of the last clause of the act of August 23, 1842 (now Rev. Stat., 1765), may well be supposed

to be, to prohibit the payment of such compensation as that demanded in this case, *unless "the appropriation therefor explicitly set forth that it is for such additional pay, extra allowance, or compensation."*

A rule for the construction of statutes declares that "every word and clause should, if possible, have assigned to it a meaning, leaving no useless words"* (Bishop, Written Laws, 82). And this view of the act of August 23, 1842 (Rev. Stat., 1765), was taken by one of the ablest lawyers and judges whom this or any other country ever produced—Attorney-General Black—in his opinion of October 17, 1857 (9 Op. Att.-Gen., 125); in which he said that:—

"A blow at the whole system of extra pay and double compensation was then struck by the act of 23d August, 1842, by forbidding any extra pay or additional compensation, in any form whatever, to officers or persons having fixed salaries, for any other services whatsoever, *unless on specific appropriation, explicitly setting forth that it was for such additional pay.*"

And see opinion of November 10, 1858 (9 Op. Att.-Gen., 260). If this construction is adopted, the claimant in this case cannot be paid. The joint resolution of March 3, 1883 (22 Stat., 640), does not "explicitly set forth that" the sum of \$300 therein mentioned is for "additional pay, extra allowance, or compensation", for an officer "whose salary is fixed by law."

If this claim is to be paid as other expenses, arising under the joint resolution of March 3, 1883 (22 Stat., 640), have been, it must be paid from the appropriation made by the "sundry civil" act of March 3, 1883 (22 Stat., 629), for the "public printing and binding", &c., "for the fiscal year ending June thirtieth, eighteen hundred and eighty-four." This appropriation does not *in any form* set forth that provision is made for *extra compensation* to a salaried officer.

In the case of *Converse v. United States* (21 How., 477), the dissenting opinion declared, when a salaried officer "claims an extra compensation for an extra service," that:—

"He must produce an appropriation which *explicitly sets forth that it is made for such additional compensation*; that is, he must show not only that Congress contemplated and provided for a service, and payment therefor, but that they contemplated and *explicitly provided that if it should be rendered by one already entitled to a fixed compensation, he should*

* The only known exception to this rule is that which exempts salaried officers and employes from its operation in claiming extra compensation as against the last clause of section 1765 of the Revised Statutes. It may be difficult to perceive the policy of the exception. Its tendency is, in some measure, to prevent the large class of persons who have never been able to obtain office, or who have no desire to do so, from being burdened with public duties, or from sharing the emoluments thereof. This policy is one, the wisdom of which can be readily understood by those in office, to whom it may be said, "because it is given unto you to know the mysteries of the kingdom of heaven, but to them [not in office] it is not given."

"For whosoever hath, to him shall be given, and he shall have more abundance: but whosoever hath not, from him shall be taken away even that he hath."—Matt., 13:12; also, Matt., 25:29; Mark, 4:25; Luke, 8:18; Luke, 19:26.

nevertheless receive, in addition thereto, the compensation provided for such service. And the addition of such compensation to a fixed compensation is *not to be inferred from any equitable considerations*, but must be found *explicitly declared in the law itself*.

Such, in my judgment, is the fair interpretation of the language of this act; and the history of the legislation of Congress upon this subject of the extra compensation of officers makes this interpretation, if possible, still more plain and necessary."

But the view taken by a majority of the court in that case is understood to be, that, when a salaried officer performs services not in the line of his official duty, nor pertaining to the duties of any office, he may lawfully be paid therefor, *if the services are authorized by law, and the compensation therefor is fixed by law, and not left to be determined by the mere discretion of some superior officer—even though no statute declares that the money to be paid is for "additional pay, extra allowance, or compensation"* (Converse v. United States, 21 How., 463, 468-475). Attorney-General Black, in an opinion November 24, 1860 (9 Op. Att.-Gen., 509), said to the Secretary of State that:—"I shall of course advise you to respect the authority of that decision [Converse v. United States], but I shall not advise you to stretch it a single inch."

Does the claimant in this case bring himself within the decision in the case of Converse v. United States? The services which he rendered, were not in the line of his official duty, nor a part of the duty of any officer; and they were authorized by law. So far the present claim is supported by the case of Converse v. United States. If the compensation is "*fixed by law*" within the meaning of that case, the claimant can be paid. In said case (21 How., 470) the court, referring to the statutes affecting extra compensation, said that:—

"The great object has been to establish, by law, the compensation for public services, whether in office, or agencies, where the nature and character of the duties to be performed were sufficiently known and definite to enable Congress to form an estimate of its value, *and not leave it to the discretion of the head of an executive department.*"

The largest class of cases which fall within the "discretion" mentioned, are those in which appropriation and other acts give express or implied authority to heads of departments, to employ agents to execute their purposes or carry them into effect, with the *implied or incidental* power to fix, by an *unlimited discretion*, the compensation for services so rendered. In *such* cases, salaried officers cannot render said services, and be paid compensation fixed by such discretion. And the same may be said in all cases involving the *same principle*. In *this class* of cases it is not to be presumed that Congress intended to permit the payment of extra compensation, or of compensation for extra services, to salaried officers, because under such statutes there is no purpose manifested to make exceptions to the general prohibitions of section 1765 of the Revised Statutes. But in the present case Congress has *expressly* designated the claimant to render the service in question, and has, *in direct terms*, given authority to "the late chairman of" the Board specified, by

"order" to name the amount to be paid, "not exceeding three hundred dollars for *services* to be performed, and *incidental expenses* to be incurred." When Congress thus *expressly* (1) authorizes a person named to render the service, and (2) requires a designated person to fix the amount of compensation in a case specially provided for, such compensation may be said to be fixed by law within the principle decided in the case of *Converse v. United States*. There is, indeed, in a certain sense a *discretion* exercised, but it is a discretion expressly authorized as to a designated *person* and service, and there is a fixed *limit* on the amount to be paid. No *unlimited* discretion can be exercised. The compensation is, therefore, practically fixed by law. That is certain which may be rendered certain—*Id certum est quod certum reddi potest*.

The special provision so made for fixing the amount of compensation in favor of a person, and for a service clearly indicated, would, *in the absence of any other limiting or qualifying statute*, necessarily show a distinct purpose of Congress to authorize the amount, when so fixed, to be paid from an appropriation giving authority for payment thereof. It has been supposed that the last clause of section 1765 of the Revised Statutes was such "*limiting or qualifying statute*", designed to secure full information to enable Congress to act understandingly before giving extra compensation to salaried officers; but, since that clause is now understood to be *without meaning or purpose under specified conditions*, which seem at present applicable, it cannot affect the claim in this case.

Accounting officers cannot consider whether the limited and discretionary authority to make an "order" fixing the amount of compensation has been wisely exercised; but it must be presumed that such authority has. Congress did not give authority to make an "order" to pay the whole sum of \$300 "*for services*." The *maximum* of \$300 is declared by the Joint Resolution to be "*for services*" and "*incidental expenses*." It does not *appear*, that, when the claim in this case was "approved", any evidence was furnished showing the amount of "incidental expenses" incurred; but, before the "order" for payment was made, it was shown by affidavit that "not less than forty-eight street-car tickets" were used, requiring an expenditure of two dollars. This amount for "incidental expenses" satisfied the discretion of the "late chairman of said Board" in judging what Congress intended to be included for that object; and such amount must satisfy the accounting officers. It is, then, to be supposed that the cost of street-car tickets was *the*, and the *only*, "incidental expenses" anticipated by Congress, and that, after paying this, the residue of the \$300 was intended as compensation "*for services*." Since, as seems to have been determined, it is *not* necessary, as has sometimes been supposed, and as the statute says, that the appropriation under which payment is claimed shall "explicitly state that it is for * * * additional pay, extra allowance, or compensation" (Rev. Stat., 1765), the effect of the joint resolution is in express terms to require that the Public Printer shall, upon the "or-

der" of "the late chairman of said [specified] board" pay "to the late secretary of the board", within the limit prescribed, the sum fixed by said chairman.

It has been deemed proper, thus somewhat at length, to refer to statutes, decisions, and opinions; because, in view of all of them, and of the unsettled condition of the law, as indicated in many cases, including Meigs's case (4 Lawrence, Compt. Dec., 638), if not of the practical *nullification* of section 1765 of the Revised Statutes, by some of them, it may be proper that the attention of Congress be called, if possible, to the subject, in the hope that all doubts may be settled by an amendatory statute.

The Public Printer will be advised to make payment accordingly.

TREASURY DEPARTMENT,

First Comptroller's Office, July 21, 1884.

IN THE MATTER OF THE RIGHT OF A DISTRICT ATTORNEY OF THE UNITED STATES TO FEES IN PROCEEDINGS FOR CONTEMPT IN A CIRCUIT COURT OF THE UNITED STATES AGAINST PARTIES FOR INTERFERING WITH A RECEIVER APPOINTED BY SUCH COURT IN A CASE PENDING THEREIN BETWEEN OTHER PRIVATE PARTIES.—CONTEMPT CASE.

1. A receiver duly appointed by a court is an officer thereof. Any unauthorized interference with the exercise of his duties as such receiver is a contempt of the court which appointed him.
2. The proceeding against a party guilty of such contempt is in the nature of a criminal proceeding.
3. A fine imposed by a court of the United States for such contempt is to be paid, when collected, into the Treasury of the United States.
4. It is an official duty of the proper district attorney of the United States to prosecute such proceeding for contempt.
5. Such district attorney is entitled for such service to the fee prescribed by statute as "in cases at law when judgment is rendered without a jury." (Rev. Stat., §24.)
6. When a district attorney prosecutes two or more of such proceedings against several parties "which should be joined," he is entitled to only one fee therefor. (Rev. Stat., §80.)
7. The joinder of two or more contempts in one information or proceeding is controlled by sections 1024, 1035, and 1036 of the Revised Statutes.
8. There can be no lawful joinder of defendants in such proceeding, unless each one so joined advised the guilty act complained of, or in some degree assented to and aided the party committing it.
9. Statutes giving costs, or fees as costs, are to be strictly construed.

Channing Richards, United States attorney for the southern district of Ohio, in his account of fees for the first quarter of 1884, charged a docket fee of ten dollars in each of ten attachments for contempt of court of persons who had boarded a train upon a railroad in charge of a receiver duly appointed by the circuit court of the United States for

said district in a case pending between private parties in said court, assaulted the conductor and brakeman, and otherwise materially interfered with the operation of the road and with the receiver and those acting under his authority.

May 17, 1884, Mr. Richards, in answer to an inquiry of the First Comptroller, why the different defendants, charged with contempt of court, were not joined in one proceeding, or why it was necessary that there should have been as many cases as defendants, explained that separate writs had been issued and several deputy marshals sent to make the arrests, because the parties charged were somewhat scattered, and it was deemed necessary to secure their arrest as nearly simultaneously as possible. And he adds:

"It was not then known what part each person had taken, but in view of the testimony, as afterwards given, the several charges might, perhaps, be properly consolidated into three cases:

1. Those who insisted upon riding, and did so, without paying.
2. Those engaged in the assault on the conductor and brakeman.
3. Those who assaulted and beat the brakeman subsequently and at another place.

(1) The six who were fined were persons who had only committed the first offense, leaving the train at their point of destination.

(2) *Afterwards*, and whilst the train was still at that station, several persons were engaged in pelting the train officials [conductor and brakeman] with stones, &c. The only one identified was sentenced to imprisonment.

(3) During that assault the brakeman jumped on the engine and went up the railroad several miles where he got off. The other three who were imprisoned followed *subsequently* by train in search of him, and when they found him, gave him a severe beating.

Under the circumstances * * * I think that separate attachments were properly issued, but there were at least three distinct cases which could not properly be joined, as they did not all involve the same persons."

The questions submitted to the First Comptroller to decide are:

I. Whether the district attorney is entitled to fees in proceedings for contempt of court, and

II. Whether, if so, he should be allowed to charge, under the facts submitted, a fee for each of the ten attachments.

DECISION BY WILLIAM LAWRENCE, *First Comptroller.*

The Revised Statutes provide that:

"The following and no other compensation shall be taxed and allowed to attorneys * * * in the courts of the United States, to district attorneys * * * in the several States and Territories, except in cases otherwise expressly provided by law. * * *

"On a trial before a jury in civil or criminal causes or before referees, or on a final hearing in equity or admiralty, a docket fee of twenty dollars: *Provided*, That in cases of admiralty and maritime jurisdiction, where the libellant recovers less than fifty dollars, the docket fee of his proctor shall be but ten dollars.

In cases at law, when judgment is rendered without a jury, ten dollars. In cases at law, when the cause is discontinued, five dollars.

For scire facias, and other proceedings on recognizances, five dollars.

For each deposition taken and admitted in evidence in a cause, two dollars and fifty cents. * * * (Rev. Stat., 823, 824).

This is to be taken in connection with sec. 771, which is as follows:

"It shall be the duty of every district attorney to prosecute, in his district, *all delinquents for crimes and offenses cognizable under the authority of the United States*, and all civil actions in which the United States are concerned, and, unless otherwise instructed by the Secretary of the Treasury, to appear in behalf of the defendants in all suits or proceedings pending in his district against collectors, or other officers of the revenue, for any act done by them or for the recovery of any money exacted by or paid to such officers, and by them paid into the Treasury."

I. There are some general common law rules as to the compensation of public officers, and the construction of statutes providing for official salaries, fees and costs. Among them are these:

A public officer is not entitled to salary, fees or costs unless authorized by express statute: Statutes giving fees do not embrace the sovereign, unless expressly so provided: Statutes giving costs or fees as costs are to be strictly construed because in derogation of common law. Thus in *State, ex rel. Pollard v. Brewer*, auditor (59 Ala., 134), it is said:

The statutes which allow fees to sheriffs and other officers for services rendered in prosecutions by the State for criminal offenses, and in executing judgments rendered in such prosecutions, are statutes which give costs and must be strictly construed—they cannot be extended beyond their letter. It is a principle of the common law, that such statutes (as it is in reference to all general statutes), do not extend to, and embrace the sovereign, subjecting him to disability, or to liability, unless it is so expressly provided. "The king (and any person suing to his use) shall neither pay nor receive costs," was the rule at common law; and the general words of statutes giving costs, did not include the sovereign (2 Black., 400). The same principle has been applied to the governments, State and Federal, in this country, in civil and criminal causes. (*Irwin v. Commissioners*, 1 Serg. & R., 505; *McKeeban v. Commonwealth*, 3 Barr, 151; *U. S. v. Boyd*, 5 How., 29; *Commissioners v. Blake*, 21 Ind., 32; *Prince v. State*, 7 Humph., 137.) Those who accept public offices, which require them to render services to the State, must take the office *cum onere*—the rendition of such services gratuitously, unless by express statutory provision, compensation is fixed, and an express liability for its payment imposed on the State.

So in *Wortham v. Grayson County Court* (13 Bush., Ky., 57), it is said:

The State and county governments of this country never become debtors, by implication, to any of their agents, and * * * in order to hold them, or any of them, responsible for a claim, the claimant must show a legal obligation on their part to pay it.*

* * * The King in England neither pays nor receives costs; but the exceptions as to receiving costs are so numerous as well nigh to destroy that branch of the rule" (3 Bl. Com., 400 & N. 13).

"It is an established principle that the United States pay no costs, although when successful, they recover them" (4 Minor, Institutes, 788, citing *The Antelope*, 12 Wheat., 546; *United States v. Hooe*, 3 Cr., 73; *United States v. Barker*, 2 Wheat., 335).

In *Martin v. State* (1 Har. & J., 721), decided in 1805, it appeared that the attorney-general of Maryland had been indicted for extortion for charging a docket fee in a proceeding for contempt against a juror for not attending court. The court below found him guilty and assessed a fine. The case was taken to the court of appeals on error. *Pinkney*, in the argument for the State, said (page 740):

If the attorney-general has a right to charge a fee in that case, the act of 1715, ch. 48, must give it to him. It is in vain to talk of usage. The attorney-general must show, that *ita lex scripta est*, and unless he can produce a law justifying the demand, he is guilty of extortion. He does not mean to discuss the question, whether a private attorney, if there existed no regulation with respect to fees, could recover upon a *quantum meruit* for the value of his services. The case of a public officer is very different, and he must show an express law to authorize his demand. If he had a fixed salary allowed him as a recompense for his services, it would be extortion for him to receive more. It is the same thing where there are fees given to him. To vindicate himself he must show a positive law in his justification, and must not rely upon usage.

The court affirmed the sentence of the court below without publishing an opinion, but thereby in effect approved the position, which was not controverted by the accused, that an officer could claim no fee, unless expressly authorized by statute (see 15 Op. Att.-Gen., 187; *Meigs's case*, 4 Lawrence, Compt. Dec., 595, 608).

In *Board of Commissioners v. Cox* (65 Ga., 81), it appeared that Cox, sheriff, sued the county commissioners in a justice's court "for services of himself and deputy in attending upon court and summoning talesmen. The justice gave judgment for the plaintiff, and the case was appealed." The court said:

The only question made in this case is, whether the sheriff of Decatur County is entitled to charge the county for services rendered in his official capacity other than is specified in the fee bill as declared in the Code. The court decided that he was, and the county commissioners excepted. The services for which the sheriff sought to make the county liable were: 1st, for five days' attendance by himself and deputy upon the November adjourned term of the superior court in January, \$25.00; 2d, for eleven days' service of himself and deputy in attending upon the May term of the superior court, \$55.00; 3d, for summoning 40 tales jurors at the May term of the superior court by order of Judge Wright, \$6.00—total amount, \$86.00.

None of these items were either legal or proper charges against the county. The services for which he made these extra charges necessarily appertained to the general duties of his office as sheriff, imposed by law (Code, § 361), and his compensation therefor is the fees specified in the fee bill for other enumerated services for which he is entitled to charge, but *no more*. The sheriff when he took the office took it with all its burdens for the emoluments annexed thereto as prescribed by law. The mischievous practice of officers charging for extra services over and above their lawful fees, is a great evil, and cannot be too strongly condemned.

There is no authority in conflict with these cases. In the case of *United States v. Morse*, decided May term, 1844, by Justice Story, in

the circuit court of the United States (3 Story, C. C., 87), it appeared—that from June, 1836, to January 1, 1839, Morse was collector of customs, and Balkam was his deputy; that Balkam also served as inspector of customs; that Morse paid Balkam the lawful compensation for services, *both* as deputy collector and as inspector. For the Government it was contended (1) that Balkam could not lawfully hold the two offices of deputy collector and of inspector and receive the pay and emoluments of both at the same time under the act of May 7, 1822 (3 Stat., 693, sec. 14), and (2), that if he could, then by the 15th section he could not receive more than \$1,000 in any one year. Story, J., in delivering the opinion of the court, said:

There is nothing in the nature or duties of the offices of deputy collector and inspector of the customs, which makes them incompatible with each other. The 14th section of the act of 1822, ch. 107, declares “that in the ports of Boston, New York, Philadelphia, Baltimore, Charleston, Savannah, and New Orleans, no person shall be an inspector, who at the same time holds any other office in the collection of the customs, in either of the said ports.” Now the very enumeration here includes only certain specified ports, and, of course, excludes all other ports, upon the known maxim, *Expressio unius est exclusio alterius*. The policy of the section doubtless was, that, in the enumerated ports, the duties of deputy collector would or might occupy all the time of that officer, and that it would be a public inconvenience, and perhaps lead to the gross abuse of creating sinecures, to allow him to hold another office at the same time, the duties whereof he could not adequately perform, or might injuriously to the public service neglect.

As to the second question, the 15th section of the act of 1822, ch. 107, provides, “that the Secretary of the Treasury may from time to time limit and fix the number and compensation of the clerks to be employed by any collector, naval officer, or surveyor, and may limit and fix the compensation of any deputy, of such collector, naval officer, or surveyor; provided, that no such deputy in any of the districts of Boston and Charlestown, New York, Philadelphia, Baltimore, Charleston, Savannah, or New Orleans, shall receive more than one thousand five hundred dollars, nor any such other deputy more than one thousand dollars, for any services he may perform for the United States in any office or capacity.” It is upon the last clause only, that the whole controversy hinges. It is certainly obscurely drawn; and the question is, what is the proper interpretation to be given to the words, “in any office or capacity.” After weighing the subject with a good deal of care, I have come to the conclusion, that the true intent and meaning of the clause is to limit the emoluments of the deputy collector in that office to the sum specified, and to make no allowance to him on account of any incidental services he may perform, or emoluments he may receive beyond that sum; and that it was not intended to say, that if he actually performed the duties or services of any other independent office, such as inspector, in any of the non-enumerated ports, he was not entitled to receive the emoluments thereof. In short, I read the language, as if it were, “in any *such* office or capacity.” The 18th section of the same act contains a provision, having a similar policy and operation, as to the incidental services and compensation, which might be claimed, *virtute officio*, by a collector, naval officer, or surveyor.

* * * * *

It appears to me, also, that, it ought not to be presumed, that the Government, when it fixes the compensation of a deputy collector, means that he shall be compellable to perform the duties of inspector gratuitously; nor can it be presumed, that the Government, when it fixes the compensation of a deputy collector, looks to any other thing than a remuneration of the duties, which he is to be called upon to perform as such. I know of no authority given by law to the Secretary of the Treasury to compel, or to require, any officer appointed to one office to perform the duties of another independent office, either as a condition of his appointment, or otherwise. The law, as I conceive, adjusts, or intends to adjust, the measure of the compensation of every officer to the duties to be performed in that office, and not in another independent office. It does not seem to me, therefore, that the court, except upon the most clear and positive language of a statute, ought to adopt any such conclusion; and where the words are loose or obscure, and admit of two interpretations, it seems to me, that the construction ought to be favorable to the claim of the officer, who performs the duties of two independent offices.

The principle stated is to be taken with reference to the *facts of the case* (Wells, Res Adjudicata, sec. 584; Meigs's case, 4 Lawrence, Compt. Dec., 632). The opinion of Judge Story was not that when a statute which gives compensation to an officer is *susceptible of two interpretations*, the construction should be favorable to the officer; but that when there are two distinct offices, each having a compensation attached to it, and one individual performs the duties of both, that then a doubt arising on a statute, as to whether the pay of the two offices could be united in one person, should be resolved in favor of paying both. In fact, the only real *principle* of construction stated is that a statute which requires an officer to perform onerous continuous duties, and which is susceptible of two constructions, one of which would give compensation and the other not, the former on principles of justice is to be adopted. So far as this case may be regarded as stating such principle, it can only apply when the question is whether the officer shall have *no compensation for any duty of the office*, or a compensation provided by statute. *This case* does not apply when an officer *having a salary* is charged by law *with additional duties*. The statement that "where the words [of a statute giving salary or fees] are loose or obscure and admit of two interpretations * * * the construction ought to be favorable to the claimant" is not given as a *general proposition*, and as such it is unsupported by any authority, in a case in which *the Government* is sought to be charged, and is against the general doctrine on the subject, as already shown by authorities cited. The Supreme Court has never given its sanction to any such rule, either as a *general rule* of construction, or as a proper rule applicable to the facts of the case. And yet a portion of this language of Justice Story has been cited again and again, as if it were a recognized general rule of construction (Moore's case, 4 Ct. Cl., 139; Folger's case, 13 *Id.*, 90). In the case of *Moore v. United States*, *supra*, the court refers approvingly to the decision in 3 Story, but does not apply it to the case before it.

Indeed, it could not have applied it; for the doubt, if any, in the case that was to be resolved, had reference to a *fact* and not to the *law*. The court did not admit judicial construction; it said: "The act is not in any respect doubtful, but clear, definite, and peremptory."

With the principles in view which are established by the foregoing authorities, the direct question involved in this case may now be considered.

II. *The right of the district attorney to a fee in a proceeding for contempt must depend on the determination of two questions: *first*, is it his official duty to prosecute it, and *second*, has the statute prescribed a fee therefor?

I. The first question is to be determined from the words employed in section 771 of the Revised Statutes, as follows:

It shall be the duty of every district attorney to prosecute, in his district, all delinquents for *crimes and offenses cognizable under the authority of the United States*, and all civil actions in which the United States are concerned.

The question to be decided is, whether a person guilty of contempt is a *delinquent* guilty of a crime or *offense*.

In other words, the real inquiry is, whether a contempt is a criminal offense. The question whether it is so (1) *generally*, is not material, if (2) it be so within the meaning of the statute cited.

(1.) Whether contempt of court is, generally speaking, a crime *per se*, is a question upon which the authorities differ very widely.

(a.) Some of the authorities which maintain that contempts are not crimes, and that the proceedings thereon are not criminal, may be mentioned.

* "Contempt is a disobedience to the rules and orders of a court which hath power to punish such offense." "And this word is used for a kind of *misdemeanor* by doing what one is forbidden, or not doing what he is commanded." (Jacob's Law Dictionary, tit. *Contempt*.)

The power of punishing for contempt is incident to courts independently of statute, and the legislature cannot deprive them of such power, which is necessary to their protection and preservation (*United States v. Hudson*, 7 Cr., 32; *Ex parte Robinson*, 19 Wal., 510; *State v. Morrill*, 16 Ark., 324; *Neel v. The State*, 4 *Id.*, 263; *People v. Wilson*, 64 Ill., 195; *Hughes v. The People*, 5 Col., 446; *Arnold v. Commonwealth*, 80 Ky., 302).

It has consequently been held that the courts of the United States have power to punish for contempt not immediately derived from statute, but necessarily resulting from the nature of their institution (*United States v. Hudson*, 7 Cr., 32, 34; *Trial of Judge Peck*, 499 *et seq.*).

This power exists under the Constitution, not being taken away by the provisions requiring trial by jury (*Hollingsworth v. Duane*, Wall., C. C., 77, 106).

The judiciary act of 1789, sec. 17, gave to the courts of the United States power "to punish by fine and imprisonment at the discretion of the court all contempts of their authority." (1 Stat., 83).

But the act of March 2, 1831, suggested by the impeachment of Judge Peck, restricted this power (Rev. Stat., 725), at least as far as the circuit and district courts are concerned (*Ex parte Robinson*, 19 Wal., 510; 2 Story, Const., § 1774; *United States v. Holmes*, 1 Wal., jr., C. C., 1; *The State v. Morrill*, 16 Ark., 405).

In Texas it has been held that :

Contempt of court is not an *offense* within the meaning of the [Texas] Penal Code. Contempts are matters *sui generis*, and not *criminal cases* in the sense in which crimes are treated of by writers upon criminal law. They are said to be of a *criminal nature* because they are not properly civil suits, and because they involve the idea of the punishment of unauthorized acts (*Casey v. The State*, 25 Tex., 380; see also *Floyd v. The State*, 7 *Id.*, 215, where contempts are said to be of a "criminal nature").

It must be admitted, that an act may be a contempt of court and not be in one sense a crime, and that courts, having no criminal jurisdiction, such as chancery and probate courts, have the power to punish for contempts. It has been decided that an enactment denying criminal jurisdiction to a court does not deprive it of the power of fining and imprisoning for contempt (*Middlebrook v. The State*, 43 Conn., 257, 267).

Mr. Bishop combats the doctrine that a contempt causes the offender to be liable also to a graver proceeding. (2 Bishop, Crim. Law, 7th ed., § 265; *Rex v. Revel*, 1 Stra., 420; *Reg. v. Rogers*, 7 Mod., 28). And he does not consider the fine or imprisonment for contempt as a *punishment*, but merely as a *consequence* flowing from the act of one placing himself in opposition to the machinery of law, and being borne down by it, because it must move on. (2 Bishop, Crim. Law, 7th ed., § 241.)

Proceedings in attachment for contempt are sometimes said to be civil or *quasi* civil. There are certain contempts the punishment for which is "to be looked on rather as a civil execution for the benefit of the injured party, though carried on in the shape of a criminal process for a contempt of the authority of the court" (4 Bl. Com., 285; *Buck v. Buck*, 60 Ill., 105; *Crook v. The People*, 16 *Id.*, 535; *Hawley v. Bennett*, 4 Paige, 163).

The order of commitment in such cases is not *punitive* but *coercive*. The private party alone is interested in its enforcement, and when he is satisfied the imprisonment terminates (*Phillips v. Welch*, 11 Nev., 187; *Howard v. Durand*, 36 Ga., 346; *Tome's Appeal*, 50 Pa. St., 285).

A proceeding against a party requiring him to show cause why he should not be attached for contempt for an alleged violation of a restraining order in a civil action, has been held to be a *quasi* civil one (*Beck v. State*, 72 Ind., 250; *In re Cary*, 10 Fed. Rep., 629, *note*).

In Alabama it has been held that a proceeding for contempt is not a criminal prosecution, for, if it were, it could not be tried by the chancellor, nor could a jury be dispensed with. Hence the right of the accused to be heard does not belong to such proceedings (*Ex parte Hamilton*, 51 Ala., 66, 68).

The proceeding may be instituted not only to punish the guilty party, but also, and perhaps chiefly, to cause restitution to the party injured (*Stimpson v. Putnam*, 41 Ver., 247; *In re Chibs*, 22 Wal., 157, 168).

In New York, proceedings, as for contempt, as a means of securing and enforcing a civil remedy, are recognized not only as a right of the

party in interest, but they are intended to make part satisfaction for any damage done him by the breach of an injunction (*Hawley v. Bennett*, *supra*; *Rogers v. Patterson*, 4 Paige, 455).

Such contempts and the process thereon being properly the civil remedy of an individual for a private injury are not released or affected by a general act of pardon (4 Bl. Com., 285; *Hendryx v. Fitzpatrick*, 19 Fed. Rep., 813).

In the case last cited, Lowell, J., said :

"The process of contempt has two distinct functions,—one, criminal, to punish disobedience, the other, civil and remedial, to enforce a decree of the court and indemnify private persons.

In patent causes it has been usual to combine the two, and to order punishment if it is thought proper; or indemnity to the plaintiff, if that is all that justice requires; or both (*In re Mullee*, 7 Blatchf., 23; *Double-day v. Sherman*, 8 *Id.*, 45; *Schillinger v. Gunther*, 14 *Id.*, 152; *Phillips v. Detroit*, 3 Ban. & A., 150; *Dunks v. Gray*, 3 Fed. Rep., 862; *Searls v. Worden*, 13 *Id.*, 716; *Matthews v. Spangenberg*, 15 *Id.*, 813).

We are aware that it was at one time the opinion of Judge Blatchford that a sum of money ordered to be paid to a plaintiff, in a cause of this kind, was a criminal fine, which could only be remitted by a pardon; but we are of opinion that such a fine for the benefit of a private person cannot be remitted by the president, and is a debt of a civil nature; and that Judge Blatchford has so treated it in the latest case which has come before him. His first opinion is stated in *Mullee's case* (7 Blatchf., 23), and *Fischer v. Hayes* (6 Fed. Rep., 63); but when the latter case came before the Supreme Court, they expressed a significant doubt whether the order to pay money for the use of the plaintiff was not an interlocutory decree in a civil cause (*Hayes v. Fischer*, 102 U. S., 121), and when the case came back, Judge Blatchford admitted the defendant to bail (*Fischer v. Hayes*, 7 Fed. Rep., 96), which he could not have done if the judgment were criminal in its nature. The doubt of the Supreme Court might well have been even more strongly expressed."

The court proceeds to establish the doctrine that attachments for contempt to enforce orders of court for the payment of money, and the like, being civil, and liable to be waived or condoned by the party in interest, are mere debts, to which insolvent laws discharging the person are applicable. It is also said in this case that the practice of having the proceedings in contempt in civil cases at common law, on the crown side of the court, after the order of attachment, is a good one where punishment is asked for, but that it is no longer the rule in chancery, and numerous authorities are cited in support of the assertion; and that even attachments for non-payment of money by attorneys to clients, once considered criminal (2 Hawk., P. C., 218 *et seq.*), are now regarded of a civil character (*Ex parte Culliford*, 8 B. & C., 220; *Rex v. Edwards*, 9 *Id.*, 652). But it has very frequently been held that where a party has been charged with contempt for breach of injunctions, and such like, it becomes a *distinct proceeding on behalf of the people* (*Crook v. The People*, *supra*).

Bleckley, J., in *Smith v. McLendon* (59 Ga., 523), declares, that,

"Imprisonment under an attachment for contempt, to compel obedience by an officer of court to a lawful order to pay over money which

he has collected in the course of his official or professional duty, is not imprisonment for debt. It is sound disciplinary dealing with an unruly member of the forensic household. One who lives and moves within the precincts of the court misbehaves, to the injury of a person who has trusted him, and whose confidence he has abused, and the court orders him to make redress. He refuses, and the court, as the minister of law, chastens him by imprisonment, and endeavors to coerce obedience. It is true, he is a debtor; but he is more than a debtor—he is an assistant in the affairs of justice, and as such, bears a peculiar and special relation to the law. Through that relation the court acts upon him, treating him, not as a mere debtor who will not pay, but as a domestic of the law, who refuses to obey his master."

A recent writer holds that there is a distinction between civil and criminal contempts, and that the distinction is that in a *civil* contempt, the offense consists in *refusing* to obey some order made for the benefit of the opposite party; but if the offense is directed against the dignity of the court, or if it consists of doing something positively to the injury of the opposite party, it is criminal in its nature (Wells, *Jurisdiction of Courts*, p. 183, *note*, citing *Phillips v. Welch*, 11 Nev., 187).

The same act cannot be the basis of an award of indemnity, and, at the same time, be punished as a criminal contempt (Wells, *Jurisdiction of Courts*, p. 183, *note*; *Pierce's case*, 44 Wis., 412).

The distinction between punishing contempt of court as a crime, and using the process of attachment for contempt as a means to enforce orders and decrees of the court is preserved in the Revised Statutes (Rev. Stat., 725, 913, 4973, 4975; see *In re Chibs*, 22 Wall., 157, 168).

In the United States courts the proceeding is treated as in the nature of a criminal action, and the offense is a *quasi* crime *in rem*; a specific criminal offense. The imposition of a fine is a judgment in a criminal case, which the court has no power to vary after the expiration of the term, nor is the proceeding reviewable on appeal.

The attachment for contempt is a criminal procedure, in which the party must appear in person and not by attorney, and if committed cannot, according to American practice, be bailed (see valuable note to *In re Cary*, 10 Fed. Rep., 629).

It has been sometimes held that the summary process of contempt must be denied, when the party asking for it has some other sufficient legal remedy (*State v. Blackwell*, 10 S. C., 35; *Haines v. Haines*, 35 Mich., 138; *The State v. Blocker*, 14 Ala., 450; *Harrington v. Jennings*, Loft, 188).

But the better view is that in such a case the court will not be prevented even by a statutory provision from treating the offense as a contempt, if thereby the ends of justice may be best promoted (2 Bishop, *Crim. Law*, 7th ed., §273; *The State v. Williams*, 2 Spears, 26).

One of the earliest cases in this country which seems to strengthen the position that a proceeding for contempt is not criminal is *Martin v. The State* (1 Har. & J., Md., 721), to which reference has already been made.

The Maryland statute of 1715, ch. 48 (1 Dorsey's Laws, 43, sec. 7), after providing for the fees of attorneys, prescribes fees "to his majesty's attorney-general, for any *action* in the provincial court at the suit of his majesty, *indictment*, *presentment*, or *information*, the sum of 400 lbs. of tobacco and no more."

Luther Martin, attorney-general of the State, was indicted in 1805 for extortion, for charging under this statute a fee for proceeding against a juror for contempt for failing to attend court. The attorney-general was fined in the court below, and his case was taken on error to the court of appeals. In his argument he insisted that the attachment proceeding was an *action* within the statute of 1715, and that he was, therefore, entitled to the docket fee provided for therein. In his argument he said (p. 736):

The attorney-general never received fees in cases of attachment against *witnesses* for non-attendance. * * * An attachment against a witness issues on the application of the party who wishes the attendance of his witness. But if a juror does not attend, a general order of court is given directing attachments against such as do not attend, returnable to the subsequent term. The attachment cannot issue without directions from the attorney-general: and the attorney-general could not direct without the order of court. (Act 1715, ch. 48, sec. 2, 3.)

William Pinkney, for the State, said (p. 742):

It cannot be contended that an attachment is either an indictment, presentment or information. There being only one other expression in the provision on which to rely, the attorney-general has contended that an attachment is an action or *quasi* an action. To do this, he has cited a number of cases to prove, what any of them would have established and cannot be controverted, that an attachment is a criminal proceeding. But still it remains to be proved that an attachment is an action. He has always understood that the word "*action*" was used in this law in contradistinction to criminal suits. The legislature could not have intended to mean by the word "*action*" criminal proceedings, because they have afterwards used words to embrace almost every criminal proceeding. In the provision regulating the fees of prosecutors in the county courts, the word "*action*" is not used. Yet attachments against jurors as frequently issue from the county courts as from the general court. It follows, therefore, that the word "*action*" must mean civil suits. The definitions of the word "*action*" in the law books, all prove that it is either the assertion of an individual right, or a criminal proceeding carried on by and for the use of an individual. Actions are said to be either criminal or civil; criminal, as appeals of death, felony or mayhem—civil, either real, personal or mixed (1 Bac. Abr., 26; 2 Wood's Inst., 561; Jacob's Law Dictionary, tit. *Action*). But it is needless to examine the books for a definition of the word action; the sense in which the legislature have used it is obvious. If they had intended it as a *nomen generalissimum*, to comprehend every species of criminal as well as civil proceedings, why add the other words "*indictment*, *presentment* or *information*?"

The Court of Appeals affirmed the judgment of the Court below, without publishing an opinion, thereby in effect holding that proceeding for contempt was neither an *action*, *indictment*, *presentment* nor *information* within the meaning of the act of 1715.

But this does not *necessarily* show that the Maryland court considered that a contempt is not a criminal offense.

It is to be presumed that the reasoning of Mr. Pinkney, the prosecuting attorney, was acquiesced in by the court.

Mr. Pinkney maintained :

1. That the act above named alone gave a fee in the case before the court, if any fee could be claimed.

2. That this act, inasmuch as it was a *special* provision, excludes the supposition that any other fees than those mentioned in it, could be allowed.

3. That it cannot be pretended that an attachment is either an *indictment*, *presentment*, or *information*.

4. *Action* being the only other provision on which to rely, it can be proved that an attachment is not an action as used in the act, though it is a criminal *proceeding*.

Action in this law is contradistinguished from *criminal suits*. The legislature could not have meant by the word "*action*," criminal proceedings, because they have afterwards used words to embrace almost every criminal proceeding. "*Action*" in this law means, therefore, "*civil suits*."

It will be seen that a fee could not be charged by the attorney-general *under the law mentioned*, for attaching a non-attending juror for contempt, because attachment is not an *indictment*, a *presentment*, an *information*, or a *civil suit*.

The construction of this law narrowed the meaning of the word "*action*" to civil suits. But actions are, as Mr. Pinkney admitted, either *criminal or civil* (1 Bac. Abr., 26 ; 2 Wood's Inst., 561 ; Jacob's Law Dict., tit. *Action*). The legislature in enacting the law before the court for construction, had not, he contended, used the word *action*, however, as a *nomen generalissimum*, or the words "*indictment, presentment, or information*" would not have been added.

This case, consequently, is far from proving that attachment for contempt is not an action. It simply maintains that "*action*" as used in the Maryland act of 1715, means *civil action*, and that, an attachment for contempt is neither a *civil action*, on the one hand, nor an *indictment, presentment, or information* on the other.

(b.) Indeed it seems well settled, by the weight of authority, that a proceeding for contempt of court of *all kinds* is a criminal proceeding, contempt being a crime, and though the power of the court to punish it is often resorted to for the protection and enforcement of private rights, such as the payment of money improperly withheld from suitors by officers, and the like, and though the modes of proceeding may be somewhat varied when the object is to afford a summary remedy for the violation of a private right, yet the character of the proceeding as criminal, should not be lost sight of (Pitman's case, 1 Curtis, C. C., 189; United States v. Jacobi, 14 Int. Rev. Rec., 45; s. c. 1 Flip., C. C., 108 :

Ex parte Kearney, 7 Wheat., 38; 3 Op. Att.-Gen., 622; 4 *Id.*, 458; *In re Mullee*, 7 Blatch., C. C., 23; *State v. Sauvinet*, 24 La. Ann., 119; *Whittem v. State*, 36 Ind., 196).

Woodward, J., has said that "a proceeding for contempt is a *substantive* criminal offense." (*Commonwealth v. Newton*, 1 Grant, Pa., 453.)

Drummond, J., in *Fanshawe v. Tracy* (4 Biss., C. C., 490, 497), has well defined the scope and effect of the proceedings for contempt, as follows:

"A party against whom proceedings for contempt are instituted * * * has committed an offense against the United States. The court is the mere instrument or organ of the Government, in punishing the person for the offense which he has committed. * * * If he is imprisoned by order of the court, it is the act of the United States. The United States is the custodian of his person. If he is fined by order of the court, the fine goes to the United States, and although it may be a proceeding growing out of a civil action, it is distinct in its character in many of its essential particulars. It is not a crime in one sense, but it partakes of the nature and character of a crime, and I do not see * * * why, if a man is imprisoned for a contempt of a court of the United States, and breaks jail and escapes into another State, he cannot be arrested and returned to his imprisonment under the authority of the United States."

In Virginia this view is taken. Moncure, J., said in *Baltimore and Ohio R. R. Co. v. Wheeling* (13 Grat., 57):

"A contempt of court is *in the nature* of a criminal offense, and the proceeding for its punishment is *in the nature* of a criminal proceeding."

Contempts in presence of a court by violence, insulting language, &c., are frequently termed *criminal contempts*. (*Androscoggin & K. R. R. Co. v. Androscoggin R. R. Co.*, 49 Me., 400.)

Such contempts fall within the definition of a criminal cause. They are offenses against the public. They are breaches of a public law for which a specific punishment is prescribed. They can be proceeded against by attachment. They are so classed by text writers. (*Middlebrook v. The State*, 43 Conn., 262; see also *Com. Dig., Attachment*, A. 4; 4 Bl. Com., 288; *Hummel's case*, 9 Watts, 421; *Cartwright's case*, 114 Mass., 230; *Durant v. Supervisors*, 1 Woolworth, C. C., 377; *Matter of Rhodes*, 65 N. C., 518; *Morris v. Whitehead, Id.*, 637; *Crook v. The People*, 16 Ill., 534.)

In *Ex parte Kearney*, 7 Wheat., 38 (1822), Story, J., says, adopting the words of Lord De Gray, C. J., in *Brass Crosby*, Lord Mayor's case (3 Wils., 188): "When a court commits a party for contempt, their adjudication is a *conviction*, and their commitment in consequence is *execution*." And it was held in this case that a motion in the Supreme Court of the United States for a writ of *habeas corpus*, in behalf of a person imprisoned for contempt by the circuit court of the District of Columbia, in refusing to answer as a witness, must be denied, because "this court (the Supreme Court) has no appellate jurisdiction in *criminal cases*."

The *Yates case*, decided prior to this (1809), held that the supreme court of New York had no power to discharge a person committed by

the court of chancery for contempt. (Yates' case, 4 Johns., 317; s. c., 6 *Id.*, 337; s. c., 5 *Id.*, 283; s. c., 9 *Id.*, 395; Hurd, Habeas Corpus, 253, 343, 412.) These two cases have been quite extensively followed. (*Ex parte* Williamson, 26 Pa. St., 9; Johnston v. Commonwealth, 1 Bibb Ky., 598; Jordan v. State, 14 Tex., 436.)

The offense of contempt of court is against the State, not the judge, or the party in the cause, therefore the proceedings should properly be entitled as of "The State" against the one in contempt. (2 Bishop, Crim. Law, 7th ed., § 269.)

It was said in United States v. Wayne (Wall, C. C., 134), that before attachment issues the proceedings must be entitled in the suit in which the contempt is alleged: afterwards they are to be entitled on the criminal side. (See also Folger v. Hoogland, 5 Johns., 235; People v. Ferris, 9 *Id.*, 160; *Ex parte* Brouson, 12 *Id.*, 460; Stafford v. Brown, 4 Paige, 360; R. v. Sheriff of Middlesex, 7 T. R., 439, 528.)

Contempts are of two sorts:

First. Those which are committed *in facie curiat*, and called *direct* contempts.

Under this class have been placed those which consist in resisting or insulting the orders and processes of the court or the persons of the judges, even though not in court. (Charlton's lease, 2 Myl. & Cr., 316; Com. v. Dandridge, 2 Va. cases, 408.)

Second. Those committed out of the view and hearing of the court, called *constructive* contempts. (See, in reference to these two classes of contempts, Hurd, Hab. Corp., 7; Cooley, Torts, 424; 4 Bl. Com., 286; 2 Hawk., 206; Hummel's case, 9 Watts, 421; Watson v. Citizens' S. Bank, 3 s. c., 164; State v. New Orleans Civil Judges, 32 La. Ann., 1256; Watson v. Williams, 36 Miss., 331; State v. Matthews, 37 N. H., 451.)

A difference in the *method of procedure* arises from the distinction between direct and constructive contempts.

When the contempt is committed in the presence of the court, the court will of its own motion notice and punish summarily. If the person committing such an offense leaves the court-room and absconds before any action had, the court may in his absence sentence him for contempt, and may do it within any reasonable time before the end of the term, and without process issued for his arrest. In cases of such contempt the offender may be instantly apprehended upon the order of the court and imprisoned, without any evidence being necessarily taken. (4 Bl. Com., Wend. ed., 283, *et seq.*; Whar. Crim. Pl. and Pr., 8 ed., § 967; 2 Hawk., 222; 1 Tidd, Pr., 3 Am. ed., 88; 6 Dane, Abr., 528, ch. 193, art. 28; 7 *Id.*, 307-'8, ch. 220, art. 5; United States v. Wayne, Wall, C. C., 134; *In re* Judson, 3 Blatchf., C. C., 148; Commonwealth v. Dandridge, 2 Va. cases, 408; State v. Mather, 37 N. H., 450; Clay's case, Pr. Dec., 221; Crow v. State, 24 Texas, 12; Androscoggin & K. R. R.

Co. v. Androscoggin R. R. Co., 49 Me., 400; Middlebrook v. The State, 43 Conn., 257, 269.)

In cases of constructive contempt of court or of contempts not committed in the presence of the court, the offender is brought before the court by means of information under oath of persons witnessing the contempt, stating the facts which constitute it, and thereupon* in the discretion of the court an attachment is issued against the offender, or, what is more usual, a rule is made upon him to appear and show cause why an attachment should not issue against him. (*Gandy v. State*, 13 Neb., 445; *State v. Blackwell*, 10 S. C., 35; *High, Ex. Rem.*, 565, 576; *Cooley, Torts*, 425; and authorities *supra*.)

When the offender appears, he is not entitled to a trial by jury (*Hollingsworth v. Duane*, Wall., 77; *Res. v. Oswald*, 1 Dall., 319; *State v. Doty*, 32 N. J. L., 403; *State v. Matthews*, 37 N. H., 450; *Patrick v. Warner*, 4 Paige, 397; *People v. Bennett, Id.*, 282; *Ex parte Grace*, 12 Iowa, 208; 2 Bishop Crim. Law, 7th ed., § 269; *Neel v. The State*, 4 Eng., 259).

In prosecutions for contempt the party accused is to have usually an opportunity to be heard, before he is adjudged finally guilty of contempt and punished. He may be committed before the conviction for the contempt, but this is for the purpose of securing his presence before the court, to answer for his contempt (*Ex parte Langdon*, 25 Vermont, 682; *Ex parte Ireland*, 38 Tex., 344).

Where commitment for contempt is intended as a *punishment* for the offense, a *definite time* should be specified. But where it is designed to compel obedience to an order of the court, it should be for so long only as the contumacy should continue (*Hurd, Hab. Corp.*, 415; *Goff's case*, 3 M. & S., 203; 1 Burns, Jus., 382; *Rex v. Hall*, 3 Burr., 1636; *Baldwin v. Blackmore*, 1 *Id.*, 602; *Bracy's case*, 1 Ld. Raym., 100).

The proceedings for contempt are various:

(a.) The more usual course, probably, is, a rule to show cause why one should not be adjudged guilty and punished for contempt (*Fanshawe v. Tracy*, 4 Biss., C. C., 490).

(b.) Or an order may be made *nisi*, that is, the party is notified that he will be adjudged guilty, &c., unless before such a day, he show cause to the contrary.

(c.) Or the offender may be proceeded with in the first instance by attachment—which is a process to arrest the body of the person complained of, and bring him before the court to show cause why he should not be adjudged guilty and punished, &c., for the contempt (*Ex parte Langdon*, 25 Verm., 682, 683).

(d.) In proceedings for contempt for breach of injunctions, the practice of some of the circuit courts of the United States is to require that

* There are circumstances, however, such as where private rights are concerned, in which the court has no discretion. (2 Bishop, Crim. Law, 7th ed., § 272; *Ex parte Chamberlain*, 4 Cow., 49.)

a motion be made that the defendant stand committed for the breach, after notice to the defendant that such motion would be made (*Worcester v. Truman*, 1 McLean, C. C., 483; *Gray v. C. I. & N. R. R.*, 1, Wool, C. C., 63).

Any unauthorized interference with a receiver's possession constitutes a contempt of court, because he is an officer of court, and his possession is deemed the possession of the court. The unauthorized interference with or disturbance of his possession directly questions the power of the court appointing him, and it becomes the duty of the court to protect him. The protection the court extends is punishing as for a contempt such unauthorized interference with the possession of the receiver (*High on Receivers*, 163, 164; *Noe v. Gibson*, 7 Paige, 513; *De Visser v. Blackstone*, 6 Blatchf. C. C., 235; *Lane v. Sterne*, 3 Gif., 629; *Skip v. Harwood*, 3 Atk., 564; *Spinning v. Ohio Life Insurance and Trust Co.*, 2 Disney, 368).

It is no defense that the unlawful act was aimed at the *individual*, and not at the officer as such (*United States v. Keene*, 5 Mason C. C., 453).

A garnishee proceeding, to reach a debt or funds belonging to a railroad company, for which a receiver had been appointed with direction to take possession of all its property, has been considered a contempt of the appointing court, its leave for the proceeding not having been requested (*Richards v. People*, 81 Ill., 551).

An attachment for contempt is proper in such a case to bring the disturber of the receiver's possession before the court, and it is a criminal proceeding (Com. Dig. "Attachment," A, 4; 4 Bl. Com., 288; *Hummel's case*, 9 Watts, 421; *Cartwright's case*, 114 Mass., 230; *Winslow v. Nayson*, 113 *Id.*, 411; *McDermott v. Clary*, 107 *Id.*, 501; *Folger v. Hoogland*, 5 Johns., 235; *Ex parte Kearney*, 7 Wheat., 38; *Durant v. Supervisors*, 1 Woolworth, C. C., 377).

In the present case the prosecution for contempt was clearly, in view of the foregoing, a criminal proceeding, in which the Government was interested as plaintiff.

Any punishment inflicted by the court for the contempt was a punishment for a wrong to the United States, and any fine imposed goes to the United States and not to the parties to the suit pending which the contempt was committed (Rev. Stat., 3617; *Matter of Rhodes*, 65 N. C., 518; *Morris v. Whitehead*, *Id.*, 637).

Upon general principles it was the duty of the district attorney, if charged to vindicate the authority of the United States as represented in its courts, to appear in its behalf as prosecutor of the offense committed

(2.) Especially was it his duty in view of the statute, for clearly a proceeding for contempt is within the meaning of section 771 of the Revised Statutes. That section makes it the duty of every district attorney to prosecute in his district all delinquents for crimes and offenses "cognizable under the authority of the United States."

The words "cognizable under the authority of the United States" are comprehensive enough to include every form of punitory proceeding having public justice in view of which courts could take jurisdiction. The act of March 3, 1801 (2 Stat. 115, sec. 2) provided that:

"All fines, penalties and forfeitures, accruing under the laws of the States of Maryland and Virginia, which by adoption have become the laws of this district, shall be recovered with costs, by indictment or information in the name of the United States, or by action of debt, in the name of the United States and of the informer; one-half of which fine shall accrue to the United States, and the other half to the informer."

Here is a specific designation of crimes (Levy court *v.* Ringgold; 5 Pet., 454). So the Maryland statute of 1815, ch. 48 (1 Dorsey's Laws, 43), expressly limited the duties of the Attorney-General to that class of crimes punishable under "indictment, presentment or information" (Martin *v.* State, 1 Har. & J., Md., 740). But section 771 of the Revised Statutes covers all crimes and offenses "cognizable under the authority of the United States" whether prosecuted by indictment, presentment or information, or by a more summary proceeding. This section, then, is sufficiently comprehensive in terms to include crimes and offenses of every character.

The policy of the statute requires it to be so construed. A contempt of court is a public offense. It is as pernicious in its consequences as ordinary crimes. Finch, J., in *People v. Mead* (92 N. Y., 420), has said:

One who disobeys the lawful order of a court not only offends against the dignity of the particular tribunal, but also against the public law. The particular court may pass over the contempt and suffer its order to be spurned, but the offense against the people remains. Their authority has been contemned, the administration of public justice assailed, and its power despised.

It is well settled in the jurisprudence of the United States, as has been shown, that a contempt of court is an offense. Thus in *New Orleans v. The Steamship Company* (20 Wall., 387) it appeared that the mayor of New Orleans had disobeyed an order of court for which he was fined \$300 by the circuit court of Louisiana. The Supreme Court on appeal said:

"The fine of three hundred dollars imposed upon the mayor is beyond our jurisdiction. Contempt of court is a specific criminal offense. The imposition of the fine was a judgment in a criminal case. That part of the decree is as distinct from the residue as if it were a judgment upon an indictment for perjury committed in a deposition read at the hearing" (*Crosby's case*, 3 Wilson, 188; *Williamson's case*, 26 Pa. St., 24; *Ex parte Kearney*, 7 Wheat., 41).

The crimes and offenses mentioned in the statute include (1) those defined by act of Congress, (2) those which exist at common law, as in the District of Columbia (Levy court *v.* Ringgold, 5 Pet., 451), and (3) all of every character "cognizable under the authority of the United States." This is so comprehensive as to include every possible grade of

crime or offense recognized as such within judicial cognizance. These general words must be supposed to have a purpose, and, like general words when not in some form restricted, are to be understood in a comprehensive sense. *Generalia verba sunt generaliter intelligenda.*

II. The next inquiry is whether section 824 of the Revised Statutes prescribes a fee for the district attorney for his services in a proceeding for contempt. That section gives the right to a docket fee of \$20 for services "on a trial before a jury in civil or criminal causes," and limits the amount thereof to \$10 "in cases at law, when judgment is rendered without a jury." As contempt is a criminal offense, the proceeding to prosecute it is by every fair definition a "criminal cause." The authorities show that a contempt of court is, within the meaning of section 771 of the Revised Statutes, a criminal offense. In *Hayes v. Fischer*, (102 U. S., 121) it appeared that Hayes, a defendant who was enjoined in a case in the circuit court, violated the injunction. "Proceedings were instituted against him for contempt, which resulted in an order by the court that he pay the clerk \$1,389.99 as a fine, and that he stand committed until the order was obeyed. To reverse this order, Hayes sued out this writ of error, which Fischer now moves to dismiss, on the ground that such proceedings in the circuit court cannot be re-examined here."

The court held:

If the order complained of is to be treated as part of what was done in the original suit, it cannot be brought here for review by writ of error. Errors in equity suits can only be corrected in this court on appeal, and that after a final decree. This order, if part of the proceedings in the suit, was interlocutory only.

If the proceeding below, being for contempt, was independent of and separate from the original suit, it cannot be re-examined here either by writ of error or appeal. This was decided more than fifty years ago in *Ex parte Kearney* (7 Wheat., 38), and the rule then established was followed as late as *New Orleans v. Steamship Company*, 20 Wall., 387.

It may be said that attachment for contempt is a "case."

"The words 'case' and 'cause' are constantly used as synonyms in statutes and judicial decisions, each meaning a *proceeding in court*, a suit or action" (*Blyew v. United States*, 13 Wall., 581, 595).

"The primary meaning of the word case, according to lexicographers, is *cause*. When applied to legal proceedings it imports a state of facts which furnishes occasion for the exercise of the jurisdiction of a court of justice" (*Kundolf v. Thalheimer*, 12 N. Y., 593, 596).

"Cases" includes not only causes but *special proceedings* (*Benson v. Cromwell*, 26 Barb., 218, 222).

But a contempt committed in the face of the court and summarily punished does not constitute a *case* for which a district attorney of the United States can claim a fee, for, as said by McKean, C. J., in *Res. v. Oswald* (1 Dal., 343, 350), "If a man commits an outrage in the face of the court, what is to be tried? What further evidence can be necessary to convict him of the offense, than the actual view of the judges?"

And unless there is something *contested* there is no "case" (Bouv. Law Dic., *tit.* Case). But it may well be doubted whether a party can be tried or convicted without a formal written charge and a trial unless by his consent these are waived. There must be "due process of law" when there is no waiver. A party who commits an outrage in the face of the court may have the defense of insanity—he may not know the difference between a court and a town meeting. He has a right to be heard by himself and counsel.

A proceeding for contempt is regarded as a distinct and independent suit (*Hayes v. Fischer*, 102 U. S., 121, 122; *In re Morris*, 22 Eng. Law and Eq., 150; *Ex parte Langdon*, 25 Vermont, 680; *Lyon v. Lyon*, 21 Conn., 185; *State v. Clerk of Bergen*, 1 Dutcher, N. J., 209; *Crook et al. v. The People*, 16 Illinois, 534; *Sperry v. Winton*, 1 Indiana, 96; *Ingle v. The State*, 8 Blackford, Ind., 574; *Smith v. Brown*, 3 Texas, 360; *Deeds v. Deeds*, 1 Greene, Iowa, 394).

* It was the official duty of the district attorney to prosecute the parties guilty of contempt. Hence he is legally entitled to the fees authorized by the statute for this service (*Durant v. Supervisors*, 1 Woolworth, C. C., 381). The statute gives the right to a fee "in cases at law." The proceeding for contempt in such case as this is a "case at law." The word "case" as used in the statute is, as has been shown, a *nomen generalissimum*, comprehending every case prosecuted in the name of the United States for the public interests.

III. It is only necessary to ascertain, therefore, what are the fees to which the district attorney is entitled in this case.

It is provided that whenever two or more indictments, suits, or proceedings, *which should be joined*, are or shall be prosecuted, the district attorney shall be paid but one bill of costs for all of them (Rev. Stat., 980.) In *Durant v. Supervisors*, *supra*, it appeared that a board of officers, composed of several members, having disobeyed a mandamus commanding the performance of an official act by them as a board, were attached for contempt. Writs of attachment were issued against each member of the board by name, so that, for the contempt of the board in disobeying one writ of mandamus, several processes of arrest were issued, and they were served accordingly.

It was held that the cases should have been consolidated. The court said:

"Their [the defendants'] guilt or innocence of the charge of contempt has its foundation in the *same duty* and the *same disobedience*, and though there may be varying defenses or excuses, and a difference in the degree of guilt, the hearing together of these matters is quite as

* It has been said, *obiter*, that a proceeding for contempt for breach of injunction "is instituted and carried on by the counsel for plaintiff and not necessarily by the attorney for the Government" (*Worcester v. Truman*, 1 McLean, C. C., 485). And the opposite party was allowed, in *Doubleday v. Sherman* (8 Blatchf., C. C., 46), expenses and attorney's fees, as a part of the fine, in prosecuting the proceedings in attachment.

consistent and appropriate as the trial of the guilty and the innocent, charged in the same indictment, with the vilest crime. * * * The truth is, that, as a principle, *they are jointly and severally guilty*, and may be jointly or severally tried, as convenience and discretion of the court may determine."

It was decided in this case that the district attorney of the United States was entitled to a fee of \$10, though he prosecuted a case for contempt originating in the refusal of parties to yield obedience to a writ issued in *a suit between private parties*, but the fee of \$10 in *each case* was not allowed.

"Contempt is not barred by *other procedure*, based on injuries inflicted by the contemptuous act on third parties, the reason being that the *personal injury and the contempt, having different juridical relations*, each with a distinct penalty, have distinct punishments." (State v. Yancy, 1 N. C. Law Repos., 133; State v. Woodfin, 5 Ired. L., 199; State v. Williams, 2 Speers, 26; Wharton, Crim. Pl. and Pr., 8 ed., 973; Rex v. Lord Ossulston, 2 Stra., 1107; 1 Bish. Cr. Law, 7th ed., § 1067; 2 Id., § 264, and cases cited.)

It is certainly true, that, if a party of men board a train of a railroad in charge of a receiver appointed by a court, some of whom assault officials of the road, and some in a milder way disturb his possession, all acting together all are alike guilty of contempt of court, though not guilty to the same extent in a procedure based upon the injuries inflicted on the officials.

In such cases there are two offenses. "One offense violates the law which protects courts of justice, and stamps an efficient character on their proceedings; the other is leveled against the general law, which maintains the public order and tranquillity." (State v. Yancy, *supra*, 134; see People v. Mead, 92 N. Y., 420.) It is very possible that a number of persons might be guilty at the same time of acts, which would require separate indictments, and yet altogether commit the same offense of contempt and be fined together.

All who are present, aiding and abetting in the breach of an order of court, are liable for contempt. (St. John's College v. Carter, 4 Myl. & Cr., 497.)

In a civil action for tort the rule as to joinder of defendants is determined by the principle that when a plaintiff "has sustained an injury to his property from the co-operating consequences of two causes, though the persons producing them may not be *in intentional concert to occasion such a result*, the injured person is entitled to compensation for his loss from either one *or both of them*, according to the circumstances of the incident." (Steamer New Philadelphia, 1 Black, 76.) But this does not apply to proceedings for contempt. In the case now under consideration there were three distinct transactions occurring in succession on the same day, but at different places; that is, six persons rode upon the cars, forcibly maintaining their positions therein, refusing to pay

fare, but terminating *their acts* when they reached the desired station. This was one act by *one set of persons*. Then upon the arrival of said train at said station several *other persons* at the station assaulted the conductor and brakeman with stones. This was a second distinct act. Then *other persons* pursued the brakeman from said station to a station some miles distant, and there assaulted and beat him. It is clear that if any one of the guilty parties had been engaged in all these three distinct acts, he could be charged for contempt in one proceeding, either in one or several counts. The proceeding would follow the analogy and practice as to indictments regarding which the Revised Statutes provide as follows:

SEC. 1024. When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated.

SEC. 1035. In all criminal causes the defendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offense so charged: *Provided*, That such attempt be itself a separate offense.

SEC. 1036. On an indictment against several, if the jury cannot agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree, on which a judgment shall be entered accordingly; and the cause as to the other defendants may be tried by another jury.

The several acts mentioned were within section 1024, "two or more acts or transactions connected together," and they were "two or more acts or transactions of the same class of crimes or offenses," and hence might be "properly joined." But these sections only apply and define the law as to the *joinder of offenses*. They do not relate to the *joinder of parties* which is to be decided on common law principles. The statute simply permits the joinder of all the offenses mentioned when in other respects the case is one proper for joinder. (*United States v. O'Callahan*, 6 McLean, C. C., 597; *United States v. Burns*, 5 *Id.*, 23; *United States v. Howard*, 3 Sumn., C. C., 12; *United States v. McFarlane*, 1 Cranch, C. C., 163; *United States v. Porter*, 2 *Id.*, 60; *United States v. Devlin*, 6 Blatchf., C. C., 71; 1 *Ohitty*, *Crim. Law*, 248; *Bishop*, *Criminal Procedure*, 2d ed., 423, 444-453; *Wharton*, *Criminal Pl. and Practice*, 8th ed., 286-300.) In other words, the several acts complained of in this case constituted *offenses* which may be *joined*. But the *joinder of offenses* is one subject; the joinder of *defendants* is a different one. The law which controls the former, however, to a certain extent necessarily controls the latter. *Bishop* in discussing the *joinder of defendants* says, "the test to determine whether an offense may be deemed joint or not, has been stated by an American judge as follows: It is to consider,

'whether *each offender* be guilty in *some degree* of the *same crime*, so that he might be separately convicted even though another was the *actual* perpetrator. If each may be so convicted, their guilt is joint; but otherwise it is several.'" (1 Bishop, Criminal Procedure, 467; Com. v. McChord, 2 Dana, 242; 1 Stark, Crim. Pl., 2d ed., 33; Wharton, Criminal Pl. and Practice, 8th ed., 301-312; United States v. Kazinski *et al.*, 2 Sprague, 7.) And in limitation of the rule, Bishop says, "two defendants cannot be jointly charged with a homicide by means of an injury done by one of them to the deceased on one day, and another injury done by the other on a different day; because, in matter of law, if the facts are so, they are not jointly guilty." (1 Bishop, Crim. Procedure, 470, citing Reg. v. Devett, 8 Car. & P., 639; Archb. Crim. Pl. & Ev., 13 London ed., 54.) It is conceived that this is not *literally*, though in principle it is, accurate. If from 11 p. m. to midnight on one day A should beat B for the purpose of killing him, with C looking on and protecting A from being interfered with, so as thereby to aid A, and then from midnight to 1 a. m. of the succeeding day C should beat B with like intent, with A giving C such aid as C had given A, and this should result in the death of B, A and C would be jointly guilty of homicide and might be so indicted. But if in the case supposed, A and C acted alone and independently of each other, the crime would not be joint, even if death resulted, not solely from the act of either one, but from the acts of both; or let the purpose of each acting alone and independently in the case last supposed be simply to commit an assault and battery, and with such being the fact, not resulting in death, the offense would not be *joint*; each would be *separately* guilty of an assault and battery. The *test* to determine the joint or several character of the offense is to ascertain whether each offender in some degree assented to and aided or advised the guilty act of the other. So far as each so incited, the offense is joint; to the extent which each acted without the assent and aid, or without the request actual or implied of the other, the offense is not joint. The authorities collected in Wharton's Criminal Pleading and Practice, 8th ed., 301, are full and conclusive on this point. Parties to the crime of adultery *may* be jointly indicted. (Com. v. Elwell, 2 Metc., Mass., 190; State v. Mainor, 6 Ired., 340; see Wharton Criminal Law, 8th ed., 1339.) "The general rule is, as laid down in 1 Stark Crim. Pl. C. 2, and other works of good authority, that where the same evidence, as to the act which constitutes the crime, applies to two or more, they may be jointly indicted." (Shaw, C. J. in Com. v. Elwell *et al.*, 2 Metc., Mass., 191, citing Hammond on Parties, 252; 2 Hawk. C., 25, § 2.) Judged by the test above stated, there should have been three proceedings for contempt in the case now under consideration. It does not appear that any person either *advised* or in any degree assented to or aided any wrongful act, except in the one separate offense in which he participated.

IV. Some explanation may be proper, in order to avoid any misunderstanding as to the rights of district attorneys to docket fees in proceedings for contempt. The right to a fee only exists in a "case" or "cause" (Rev. Stat., 824), in which a delinquent is prosecuted for the crime or offense of contempt (Rev. Stat., 871). If a witness duly served with a subpoena in a cause, or served under section 877 of the Revised Statutes to testify generally, fails to attend, the usual practice is, that the court will, on the application of the party desiring the attendance, issue a rule against the witness to show cause why an attachment should not issue, which is served, and if the witness then appears, testifies and purges himself of the contempt, there is in such proceeding no case prosecuted within the meaning of section 771 of the Revised Statutes. If he fails to attend in such case, an attachment issues requiring the marshal to bring him into court, or such attachment may issue without the service of a rule, though this is rarely done, and should never be, except in case of personal service of the subpoena and an affidavit of willful refusal to obey it. When the witness is brought into court on an attachment, testifies and purges* himself of contempt, and so is discharged on payment of costs or otherwise, there is in such proceeding no case prosecuted within section 771 of the Revised Statutes. If in such case, the witness waives the formal filing of an information or charges, and submits to a summary hearing by the court, and so is fined or imprisoned, it may be doubtful whether there is a "case" prosecuted within the meaning of section 771 of the Revised Statutes. But where, by order of court, the district attorney files an information, or files charges for contempt, and the accused appears voluntarily or in answer to process, and "a judgment is rendered without a jury" (Rev. Stat., 824) a case is prosecuted within section 771 of the Revised Statutes. The same principles applicable to prosecutions against witnesses for contempt will generally apply in other cases.

The claimant is allowed three fees of \$10 each.

TREASURY DEPARTMENT,

First Comptroller's Office, June 14, 1884.

* In a proceeding on contempt at law, the party purging himself cannot be contradicted. It is otherwise in a proceeding for contempt for disobeying an injunction or other order or decree of a court of equity (4 Bl. Com., 288; Com. Dig., *Chancery*, D. 3; *Thomas v. Cummins*, 1 Yeates, 40; *Whittem v. The State*, 36 Ind., 196; *Buck v. Buck*, 60 Ill., 165; *Stuart v. People*, 3 Scam., 395; *United States v. Dodge*, 2 Gall., 313; *Cartwright's case*, 114 Mass., 230).

IN THE MATTER OF THE RIGHT OF THE MARSHAL OF WYOMING TERRITORY TO TWO PER DIEM FEES OF FIVE DOLLARS EACH FOR HIS ATTENDANCE ON ONE, AND FOR THAT OF HIS DEPUTY ON ANOTHER, DISTRICT COURT IN SESSION AT THE SAME TIME IN DIFFERENT JUDICIAL DISTRICTS—DOUBLE PER DIEM CASE.

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1. Construction given to sections 823, 829, and 831 of the Revised Statutes.
 2. A deputy marshal can perform the duties of a marshal in attending the sittings of court, as mentioned in sections 829 and 831 of the Revised Statutes.
 3. An officer can receive compensation only when a statute so authorizes.
 4. When a marshal is required to attend two district, or two circuit, courts held at the same time, but at different places, he is entitled to the per diem compensation prescribed by law for each.
 5. He is not entitled to double per diem compensation for attending a session of the supreme court and of a district court.

Wyoming Territory is divided into three judicial districts, in each of which the law requires a district court to be held each year by one of the three justices of the supreme court, at the time and place prescribed by the Territorial legislature. (Rev. Stat., 1865; Act July 25, 1868; 15 Stat., 178, sec. 9, 15.) A term of the supreme court is required to be held annually by the chief justice and two associated judges thereof at the seat of government of the Territory. From Nov. 20, to Dec. 8, 1882, the district courts were in session at the same time in the first and second judicial districts, one at Laramie, the other at Cheyenne. The marshal in person attended the session of the court at Cheyenne, and a deputy marshal attended at Laramie. (Rev. Stat., 592, 776, 780, 787, 823, 829, 831, 1876, 1881, 1883.)

The question is presented whether the marshal is entitled to a fee of five dollars per day for his own attendance, and a like fee for that of his deputy.

DECISION BY WILLIAM LAWRENCE, *First Comptroller*.

The statute provides that, "the following and no other compensation shall be * * * allowed to * * * marshals * * * in the several States and Territories," that is, "for attending the circuit and district courts, when both are in session, or either of them when only one is in session, and for bringing in and committing prisoners during the term, five dollars a day" (Rev. Stat., 823, 829), and that, no per diem or other allowance shall be made to any * * * marshal or deputy marshal, for attendance at rule-days of a circuit or district court; and when the circuit and district courts sit at the same time no greater per diem or other allowance shall be made to any such officer than for an attendance on one court." (Rev. Stat., 831.) Provision is made by

law in certain exigencies for holding separately and at the same time two sessions of a circuit or district court in any district of the United States. (Rev. Stat., 592. And see section 611.) And in Alabama and Georgia respectively, there is one marshal for two districts. (Rev. Stat., 776.) The same question, therefore, which now comes from Wyoming Territory, may come from any district covering all or part of a State. In such district a circuit court and a district court may be in session at the same time. The Revised Statutes provides that:

SEC. 609. Circuit courts shall be held by the circuit justice, or by the circuit judge of the circuit, or by the district judge of the district sitting alone, or by any two of the said judges sitting together.

SEC. 611. Cases may be heard and tried by each of the judges holding a circuit court sitting apart by direction of the presiding justice or judge, who shall designate the business to be done by each.

In practice, the district judge in any district frequently, if not generally, holds both the circuit court and the district court, a session of one and then of the other on the same day and at the same place, as convenience may permit or necessity require. There are some differences between the judicial organization of Territories and that of the regular judicial circuits and districts. There are three districts in Wyoming, but there is no circuit court; there is but one marshal, while there is a marshal in each of the districts covering all or part of any State, with the exception, already mentioned, of the districts in Alabama and Georgia. A usage so long continued as to make it law, if there ever could have been any doubt about it, permits a deputy marshal to attend the sittings of courts, and gives the marshal a right to the per diem fee of five dollars for this service. (Agency-Delegation case, 3 Lawrence, Compt. Dec., 61, 75.)

When more than one court requiring the marshal's attendance is held in his district at the same time, it is doubtless his duty to attend each in the manner adopted by the marshal of Wyoming.

It is a well-settled principle of law that he who accepts a public office takes it *cum onere*. It is a general principle that a service rendered by a public officer is gratuitous, so far as the public is concerned, unless a compensation is fixed and a liability imposed by an express statutory provision, and there is a further principle, which *generally prevails*, that statutes allowing fees to officers for services rendered in behalf of the Government are construed strictly—the doctrine of the common law being that statutes granting fees do not extend to and embrace the sovereign, unless it is so expressly provided. (The State, *ex rel.* Pollard, *v.* Brewer, 59 Ala., 130; Wortham *v.* Grayson Co. Court, 13 Bush, Ky., 53, 57; Board of Commissioners of Decatur County *v.* Cox, 65 Ga., 80; Martin *v.* State, 1 Har. & J., 740; Meigs's case, 4 Lawrence, Compt. Dec., 588. See United States *v.* Morse, 3 Story C. C., 91; Moore's case, 4 Ct. Cl., 139; Crier-Bailiff case, *ante*, 240; Contempt case, *ante*, 255.)

With these principles in view, the question is to be decided whether the marshal of Wyoming is entitled to the per diem fees in question.

The statutes on this subject are, in terms, mainly directed to the per diem of marshals for attendance on the circuit and district courts as organized in States. As to these, two things are to be observed: *First*, the statutes give the marshal a right to one per diem fee for attending the daily sessions of a district court when no circuit court is in session, and a like fee for attendance on the circuit court when no district court is in session; *second*, when both courts—the circuit and district—sit at the same time only one per diem fee can be paid.

The *prohibition* against the payment of two per diem fees applies only to charges for attendance on the circuit and district courts when both sit on the same day. There is a manifest reason for this. These courts generally sit at the same place, and when both sit on the same day, they generally do so at different periods of the same day, so that, in fact, the marshal can render but one day's service in such case. The express prohibition thus made carries with it, in some measure at least, an implication that there is no other prohibition. The marshal, however, cannot rest a right to fees on a prohibition. It can only exist when granted. Whatever the statute gives he is entitled to receive. And the real question is, did Congress intend to give a per diem for attendance on each district court, when two *such* courts are held at the same time in different districts, having together only one marshal? The language of the statute is:

“For attending the circuit and district courts, when both are in session, or either of them when only one is in session, and for bringing in and committing prisoners and witnesses during the term, five dollars a day.”

Bearing in mind that no session of a circuit court is now in question, and that there is no express prohibition against two per diem compensations, except when a circuit and a district court are in session at the same time, and eliminating from the provision quoted so much thereof as relates to circuit courts and *such* double compensation, it will read thus:

“For attending the * * * district courts * * * and for bringing in and committing prisoners and witnesses during the term, five dollars per day,”—that is, the marshal is entitled to five dollars per day for attending the sessions of the several district courts which he is required to attend. The statute does *not* say he shall have only the per diem for one district court, and only when one *such* court is in session. The reasonable and fair construction of the language employed, the manifest purpose of the statute, and the dictate of reason and justice is, that when a marshal is required to attend two district or two circuit courts held at the same time but at different places, he is entitled if he attend one in person and another by his deputy to the per diem compensation prescribed by law for each. The marshal in a Territory is not entitled to two per diem fees for attending a session of the supreme court and of a district court at the same place and on the same day. The statute does not in express terms name the supreme court in the

clauses prohibiting double per diem fees, but its purpose is to prevent such compensation when a district court and another court sit at the same time and place. A case within the purpose of a statute is controlled by it, even when not literally within its terms (Halstead's case, 3 Lawrence, Compt. Dec., 236).

The marshal is entitled to a per diem compensation for services in each of the district courts.

TREASURY DEPARTMENT,

First Comptroller's Office, June 20, 1884.

IN THE MATTER OF THE RIGHT OF A COMMISSIONER OF THE CIRCUIT COURT TO COMPENSATION FOR TAKING RECOGNIZANCES OF WITNESSES TO APPEAR AT ADJOURNED HEARINGS OF CRIMINAL CHARGES.—RECOGNIZANCE-WITNESS CASE.

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1. Construction given to sections 877, 879, and 1014 of the Revised Statutes.
 2. A Commissioner of the Circuit Court of the United States for the district of Massachusetts, who adjourns the hearing of a criminal charge before him from one day to the next or a later day, has no authority to take the recognizance of a witness for his appearance at the day to which the hearing is adjourned.

The account of Henry L. Hallett, a Commissioner of the Circuit Court of the United States for the district of Massachusetts, for fees for official services for the quarter ended March 31, 1884, is in this office for adjustment.

In various instances the hearings of criminal charges were not concluded by the Commissioner in one day, but adjournments thereof were had, which varied in length from one day to nine days. On such occasions, the Commissioner took the recognizances of the witnesses to appear before himself at the time to which the hearings were adjourned; and the charges for his services in this connection—for drafting the recognizances, taking the acknowledgments of them, and filing them—amount in his account to \$160.55.

The question is, therefore, presented to the Comptroller for his decision thereon, whether these charges can be allowed?

DECISION BY WILLIAM LAWRENCE, *First Comptroller.*

The act of August 23, 1842 (5 Stat., 516), giving to Commissioners of the Circuit Courts the power to arrest, and imprison or bail offenders for any crime or offense against the United States, is as follows:—

“That the commissioners who now are, or hereafter may be, appointed by the circuit courts of the United States to take acknowledgments of bail and affidavits, and also to take depositions of witnesses in civil causes, shall and may exercise all the powers that any justice of the peace, or

other magistrates, of any of the United States may now exercise in respect to offenders for any crime or offense against the United States, by arresting, imprisoning, or bailing the same, under and by virtue of the thirty-third section of the act of the twenty-fourth of September, anno Domini seventeen hundred and eighty-nine, entitled, 'An act to establish the judicial courts of the United States;' and who shall and may exercise all the powers that any judge or justice of the peace may exercise under and in virtue of the sixth section of the act passed the twentieth of July, anno Domini seventeen hundred and ninety, entitled 'An act for the government and regulation of seamen in the merchant service.'

SEC. 2. * * *. That in all hearings before any justice or judge of the United States, or any commissioner appointed as aforesaid, under and in virtue of the said thirty-third section of the act entitled 'An act to establish the judicial courts of the United States,' it shall be lawful for such justice, judge, or commissioner, where the crime or offense is charged to have been committed on the high seas or elsewhere within the admiralty and maritime jurisdiction of the United States, in his discretion to require a recognizance of any witness produced in behalf of the accused, with such surety or sureties as he may judge necessary, as well as in behalf of the United States, for their appearing and giving testimony, at the trial of the cause, whose testimony, in his opinion, is important for the purposes of justice at the trial of the cause, and is in danger of being otherwise lost; and such witnesses shall be entitled to receive from the United States the usual compensation allowed to Government witnesses for their detention and attendance, if they shall appear and be ready to give testimony at the trial."

And section 33 of the Judiciary Act of September 24, 1789 (1 Stat., 91), is as follows:—

"That for any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any justice of the peace, or other magistrate of any of the United States where he may be found *agreeably to the usual mode of process* against offenders in such State, and at the expense of the United States, be arrested, and imprisoned or bailed, as the case may be, for trial before such court of the United States as by this act has cognizance of the offense. And copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case; which recognizances the magistrate before whom the examination shall be, may require on pain of imprisonment. And if such commitment of the offender, or the witnesses shall be in a district other than that in which the offense is to be tried, it shall be the duty of the judge of that district where the delinquent is imprisoned, seasonably to issue, and of the marshal of the same district to execute, a warrant for the removal of the offender, and the witnesses, or either of them, as the case may be, to the district in which the trial is to be had. And upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death, in which cases it shall not be admitted but by the supreme or a circuit court, or by a justice of the Supreme Court, or a judge of a district court, who shall exercise their discretion therein, regarding the nature and circumstances of the offense, and of the evidence, and the usages of law. And if a person committed by a justice of the supreme or a judge of a district court for an offense not punishable with death, shall afterwards procure bail, and there be no judge of the United States in the district to take

the same, it may be taken by any judge of the supreme or superior court of law of such State."

These provisions of said acts are substantially contained in sections 879 and 1014 of the Revised Statutes.

It will, thus, be seen, that a Commissioner of the Circuit Court, for any crime or offense against the United States, may, agreeably to the usual mode of process against offenders in the State in which he resides, arrest the offender, and imprison him or bail him, as the case may be, for trial before such court of the United States as has cognizance of the offense; and when he is so imprisoned or bailed, the witnesses are to be recognized to appear at the trial to testify in the case.

The recognizances that can, therefore, be taken by the Commissioner, as specially mentioned in the foregoing acts, are (1) those binding the *accused* to appear at the proper court for trial, and (2) those binding the witnesses to appear at the trial to testify in such court. But the phrase, "mode of process," as found in the statute above cited, designates, not merely process in its technical sense, but the whole means that shall be used against the *accused* to secure his appearance, first, before the Commissioner as occasion requires, and, then, when necessary, before the proper court for trial (*United States v. Rundlett*, 2 Curtis, C. O., 43, 44). In respect to arresting, and imprisoning or bailing, *offenders* for any crime or offense against the United States, the Commissioner is, therefore, invested with powers substantially similar to those possessed by the committing magistrates of the State in which he resides (*United States v. Case*, 8 Blatchford, 250). When these can adjourn a hearing and take the recognizance of the *accused* to appear at the adjourned hearing, the Commissioner can do so likewise (*United States v. Horton's Sureties*, 2 Dillon, 94). This is the necessary effect of the expression, "agreeably to the usual mode of process against offenders in such State." Committing magistrates in Massachusetts have the power to adjourn a hearing to a time not exceeding ten days without the consent of the defendant or person charged, and to commit, or, if the offense be bailable by a magistrate, to take, with approved surety to appear at the adjourned hearing, the recognizance of, the *accused*. Section 26 of chapter 212 of the Public Statutes of Massachusetts, 1882 (page 1188), under the head of Arrest, Examination, Commitment, and Bail, reads thus:—

"A court or justice may adjourn an examination or trial from time to time as occasion requires, not exceeding ten days at one time without the consent of the defendant or person charged, and to the same or a different place in the county, as he deems necessary. In the mean time, if the party is charged with an offense not bailable, he shall be committed; otherwise he may be recognized in a sum and with sureties to the satisfaction of the court or justice, for his appearance for such further examination, and for want of such recognizance he shall be committed to prison."

Commissioner Hallett made his adjournments consistently with this provision, and, in the exercise of his authority, generally took the recognizances of the *accused* to appear at the adjourned hearings; and for these recognizances said Commissioner is allowed in his accounts. When

he took these recognizances, he also took *the recognizances of the witnesses to appear at the time to which the hearings were adjourned*. Had he the authority to take the latter recognizances? The question arises, whether the manner of dealing with witnesses by a Commissioner should be "agreeably to the usual mode of process" in the State in which he resides? It is in reference to the *arresting and imprisoning or bailing of the accused* that the statute says that the Commissioner shall act "agreeably to the usual mode of process * * * in such State." The question is not now, whether, if the State law provides that witnesses may be recognized by a justice of the peace to appear before himself at an adjourned hearing, the Commissioner can exercise a similar power. This question does not arise, since no such provision exists in the Massachusetts statutes. The only recognizances of witnesses, which the statutes of Massachusetts authorize these inferior magistrates to take, are those to appear and testify on the trial of an accused in court.

Sections 36-39 of chapter 212 of the Public Statutes of Massachusetts, 1882 (page 1189), are as follows :

"SEC. 36. When the prisoner is admitted to bail or committed, the court or justice shall bind by recognizance the material witnesses against the prisoner to appear and testify at the next court having cognizance of the offense, and in which the prisoner shall be held to answer.

SEC. 37. The court or justice, if satisfied that there is good cause to believe that any such witness will not perform the condition of his recognizance unless other security is given, may order the witness to enter into a recognizance with such sureties as may be deemed necessary for his appearance at court.

SEC. 38. When a married woman or a minor is a material witness, any other person may be allowed to recognize for her or his appearance; or, in the discretion of the court or justice, the recognizance of such married woman or minor may be taken in a sum not exceeding fifty dollars, which shall be valid and binding in law notwithstanding the coverture or minority.

SEC. 39. A witness required to recognize either with or without sureties shall, if he refuses, except as provided in the following section, be committed to prison, there to remain until he complies with such order or is otherwise discharged according to law."

There is no statute giving to a Commissioner the power to take the recognizances in question. Hence, it is evident, that the claimant in this case in taking such recognizances did so without authority. A Commissioner of the Circuit Court is an officer of inferior jurisdiction, and, hence, no presumption of authority is made in his favor (*Bridge v. Ford*, 4 Mass., 642). He can only exercise such power as is specially conferred upon him, and such incidental authority as may be necessary to carry his expressly granted powers into effect. A recognizance, being *an obligation of record* (2 Blackst., Com., 341), cannot be taken by a court *not of record*, unless the power to take it has expressly been given to said court (*Commonwealth v. Otis*, 16 Mass., 198; *Vose v. Deane et al.*, 7 Id., 280); and a statute conferring this power on such court must be

construed strictly as being in derogation of the common law (*Brown v. Fifield*, 4 Mich., 326; *Maynards v. Cornwell*, 3 *Id.*, 309; *Cadwallader v. Harris*, 76 Ill., 370; *Hollman v. Bennett et al.*, 44 Miss., 322).

The powers of Commissioners have generally been construed somewhat strictly. Thus, it was held in *Ex parte Barnes* (1 Sprague, Dec., 133), that:—

“A Commissioner of the Circuit Court has not the power to issue a writ of *habeas corpus*, to take from jail a person committed by authority of the United States, and bring him before the Commissioner, for the purpose of giving his deposition before such Commissioner, to be used in a cause pending in the District Court.”

This decision was rendered under the acts of February 20, 1812 (2 Stat., 679, sec. 1); March 1, 1817 (3 Stat., 350); September 24, 1789 (1 Stat., 88, sec. 30); and March 2, 1833 (4 Stat., 634, sec. 7). Sprague, J., said that:—

“The question is, whether the 30th section of the judiciary act, gives power to take prisoners from jail and bring them before the magistrate, merely for the purpose of giving depositions. If it does, then all the magistrates therein named, including the State judges and mayors of cities, possess it. And all the prisoners of the United States are subject to it, and may be carried to any part of the district, at the pleasure of the Commissioner, or judge of a county court of the State, or the mayor of the city. * * * The words of the section relied upon, are satisfied by the usual modes of compelling attendance.”

A recognizance, when forfeiture is declared and entered, becomes a judgment of the court in which it is forfeited (*Schultze v. The State*, 43 Md., 306). An inferior magistrate or officer of limited powers cannot render judgment, unless specially authorized by statute. No act of Congress gives a Commissioner authority to render such judgment. No statute of Massachusetts gives a committing magistrate authority to render such judgment. Hence, such recognizance would be of no avail for any purpose of judgment, and so cannot reasonably be supposed to be authorized.

There is no legal necessity for taking the recognizances in question. The writ of *subpœna*, which the Commissioner is clearly authorized to issue, and obedience to which he may enforce by attachment, accomplishes every purpose of a recognizance. This writ at common law had the effect, not only of bringing the witness to the court at the term specified therein, but also of requiring his attendance from day to day of the term till he was properly discharged; which, of course, was generally done when his testimony had been given (3 Bouvier, *Institutes*, page 410, par. 3141). Indeed, the whole term of a court of record is in contemplation of law as but one day (Bouvier, *Law Dic.*, title “Term”), and a witness, if absent without permission of the court, is liable to attachment for contempt. The act of February 26, 1853 (10 Stat., 169, sec. 3), the provisions of which are contained in sec. 877 of the Revised Statutes, so far as it provides that the witness shall not “depart the court without leave thereof,” is only declaratory of the common law. And at common law if the term went by, and the witness was not used,

and was wanted for the next term, a new subpoena might issue for that purpose (1 Greenleaf, Ev., § 309; 3 Bouvier, Institutes, page 411, par. 3141; Archb., Pr., 170). But the court could elect to take his recognizance to appear at the following term. In fact, if a *court of record* should choose to take the recognizance of a witness to appear at a future day of the term to which he has been subpoenaed, it has a perfect right to do so; for the power to take a recognizance is incident to every court of record (*Young v. Shaw*, 1 D. Chipman, 224). And it may sometimes be desirable to add in this way to the penalty of disobedience, in order the better to secure the presence of a witness, who, it is suspected, may make default in his attendance.

The court of an inferior magistrate technically has no *term*, yet the time occupied by him in hearing a charge is in law and practice and of necessity regarded as in the nature of a term, and the witnesses summoned to appear and testify before such magistrate are required to attend from day to day or from time to time, till the case is disposed of and they are properly discharged.

The process of subpoena should require the witnesses therein named to attend before the proper Commissioners to testify, "and not to depart * * * without leave," thus, by way of analogy to a similar writ issuing out of court.

The principles stated result from provisions of the Revised Statutes, sections 627, 727, 847, 856, 877, 981, 1014, 1982, 1983, 1984, 1986, 1987, 2025, 2026.

By the inherent force of the writ of subpoena the person under its command is not at liberty to depart till legally excused.

Nothing more is necessary in contemplation of law at the adjournment of a hearing than to notify the witness to be present at the time and place to which the hearing is adjourned; and for his non-attendance a writ of attachment may issue. However desirable it may be in some cases to have the strength of a recognizance with bail in addition to the subpoena, to secure the attendance of a witness at an adjourned hearing, the power to take such a recognizance has not been given to Commissioners of the Circuit Courts by any statute. It is not essential to the exercise of their jurisdiction, and hence, they cannot take it.

Mr. Hallett, therefore, as a Commissioner of the Circuit Court, has no power to take recognizances other than (1) those of the accused to appear either (a) at an adjourned hearing or (b) at the proper court for trial, and (2) those of the witnesses to appear at the trial to testify in such court.

Hence, the recognizances in question are utterly void (*Commonwealth v. Loveridge*, 11 Mass., 337; *Ferry v. Burchard*, 21 Conn., 601; *United States v. Hand et al.*, 6 McLean, 274).

The charges are disallowed.

TREASURY DEPARTMENT,

First Comptroller's Office, June 9, 1884.

IN THE MATTER OF THE AUTHORITY TO PAY, FROM AN APPROPRIATION FOR "CONTINGENT EXPENSES, FOREIGN MISSIONS," THE EXPENSES OF ACCOMPANYING THE REMAINS OF A DISBURSING CLERK OF THE DEPARTMENT OF STATE FROM WASHINGTON CITY TO HIS LATE RESIDENCE FOR INTERMENT.—FUNERAL-EXPENSE CASE.

1. An appropriation "for contingent expenses of foreign intercourse proper, and of all the missions abroad" cannot be used to pay the expenses of accompanying the remains of a Disbursing Clerk of the Department of State from Washington City to a distant place for interment.
2. There is no appropriation applicable to the payment of the latter expenses.
3. Vouchers are required in the settlement of accounts: when it is impracticable to obtain sub-vouchers for small items of expense, they should be given in detail, and their payment as a necessary expenditure should generally be verified by oath or other sufficient evidence.
4. A "consulate" is not a "mission."

In settling the account of the Disbursing Clerk of the Department of State the Fifth Auditor disallowed a voucher as follows:

"The United States, to Walter Manton, Dr. On account of the appropriation for 'Contingent Expenses, Foreign Missions,' 1884.

Date.		Amount.	
		Dollars.	Cts.
1884. Jan. 27th to Feb. 1st.	For expenses incurred, while acting under instructions of the Secretary of State, in accompanying the remains of the late Col. R. C. Morgan (late Disbursing Clerk, Department of State), from Washington, D. C., to Oswego, N. Y., between January 27, and February 1, 1884, including rail road fare, hotel bills, &c., &c., for which sub-vouchers could not be obtained.....	62	50

Approved:

FREDK. T. FRELINGHUYSEN,
Secretary of State.

Received this 9th day of February, 1884, from F. J. Kieckhoefer, Disbursing Clerk, Department of State, the sum of sixty-two $\frac{50}{100}$ dollars, in full payment of the above account.

\$62.50.]

WALTER MANTON."

The account is now presented for the final action thereon of the First Comptroller.

The remains were taken from Washington, District of Columbia, for interment at Oswego, New York, the former residence of the deceased.

DECISION BY WILLIAM LAWRENCE, First Comptroller.

The act of February 26, 1883 (22 Stat., 424, 425), entitled "An act making appropriations for the consular and diplomatic service of the Government for the fiscal year ending June thirtieth, eighteen hundred and eighty-four, and for other purposes," appropriates "for contingent expenses of foreign intercourse proper, and of all the missions abroad, eighty-five thousand dollars."

The phrase, "'Contingent Expenses, Foreign Missions,' 1884," which

is part of the caption of the voucher in this case, is taken from the Digest of Appropriations for the fiscal year ending June 30, 1884 (page 32), being the title to which the appropriation above mentioned is credited on the books of the Treasury Department; and this phrase, as used in the voucher, means that, when such expenses are paid and allowed in the settlement of the accounts of the Disbursing Clerk, they are to be charged to said appropriation. The sole question for decision, therefore, now is, whether the expenses of accompanying the remains of a Disbursing Clerk of the Department of State from Washington, District of Columbia, to Oswego in New York State were incurred "for contingent expenses of foreign intercourse proper," or of "the missions abroad"? The simple statement of the question is a sufficient answer in the negative.

The consular and diplomatic appropriation act of February 26, 1883 (22 Stat., 430, 431), appropriates, "for defraying the expenses of transporting the remains of ministers and consuls of the United States to their homes for interment, where such ministers or consuls have died, or who may die abroad while in the discharge of their duties, ten thousand dollars." The same act (22 Stat., 425, 429) appropriates money for contingent expenses "of all the missions abroad," and "for contingent expenses of United States consulates." Congress evidently assumed that expenses of transporting the remains of a minister were not a proper charge on the contingent fund for "missions abroad," and that similar expenses as to the remains of a consul were not a charge on the consular contingent fund; hence, a general appropriation was made covering all such expenses. A "mission" is the place of a Minister. A consulate is not a "mission." In view of this it cannot be supposed that Congress intended to provide for the expenses now under consideration in this case. They have not been provided for in express terms; nor is their payment necessary to execute any duty, or to perform any act, which the law requires to be done. Congress has given no sanction to any general usage requiring such expenditures.

If the voucher now in question could be allowed on proper evidence, it is not sufficient to justify a credit to the Disbursing Clerk.

The statute expressly requires that accounts shall be rendered by disbursing officers "with the vouchers necessary to the correct and prompt settlement thereof." (Rev. Stat., 3622; *Watkins v. United States*, 9 Wall., 764; *Consular-Accounts case*, 3 Lawrence, Compt. Dec., 352.)

It is not shown by any sufficient evidence that the proper sub-vouchers could not be obtained. And as to such vouchers for some of the items of expenditure, it would seem entirely practicable to have obtained them. And as to those which could not be obtained, the items of expenditure should at least be stated in detail.

The voucher presented is disallowed.

TREASURY DEPARTMENT,

First Comptroller's Office, June 21, 1884.

IN THE MATTER OF THE RIGHT OF AN AGENT OF THE UNITED STATES TO BE RE-IMBURSED HIS EXPENSES IN DEFENDING A SUIT AGAINST HIM FOR AN ALLEGED TORT COMMITTED IN THE PERFORMANCE OF HIS DUTY, AND ALSO THE AMOUNT OF THE JUDGMENT RENDERED IN SUCH SUIT.—AGENT-RE-IMBURSEMENT CASE.

Evidence is presented tending to show that an agent of the Government in the performance of his duty hired a horse to travel to a point four miles distant from the place of hiring. He drove to that point and four miles beyond it. In returning to the place from which he started, and without his fault, the horse was injured. The owner of the horse sued the agent personally as in trover, and recovered judgment against him, including costs, for \$363.56, which besides attorneys' fees and expenses, \$106.50, the agent paid. He now asks to be re-im-bursed by the Government from an appropriation made to pay "for actual and necessary expenses for transportation" of agents of the class of the claimant.

Held :

1. This appropriation is not applicable to the payment of such judgment or expenses or to the re-imbursement of the agent who paid them.
2. On the facts stated, if true, the agent was personally liable as in trover for a conversion of the horse to his use.
3. The Government is not liable for the torts of its officers or agents, in the absence of any statute on the subject.
4. If, in the case stated, the horse were hired to travel all the distance for which he was used, if the agent were not guilty of any tort or conversion, and if the judgment were wrongfully rendered, still said agent cannot be re-im-bursed for the amount paid by him, in the absence of any appropriation properly applicable to such payment, nor can a balance be certified in his favor, in the absence of a statute imposing an obligation upon the Government to pay such liability.
5. In such case there is no common-law liability of the Government; and, hence, a balance cannot be certified in favor of the claimant.
6. The common-law principles applicable as between a private principal and agent do not in all cases apply as between the Government and its agents.

The evidence in this case tends to show the following facts :

January 27, 1883, Charles E. Behle, a special examiner of the United States Pension Office, in the performance of his official duties, hired, at a livery stable in Fultonville, New York, a horse and cutter to drive to Stone Ridge, four miles distant. Having driven to Stone Ridge, he found it necessary to drive four miles beyond. On his return, and while beyond the point to which he hired the horse and conveyance to go, he met with an accident on the highway, which was torn up and obstructed by the new West Shore Railway Company. The horse's leg was broken, which rendered him useless, and made his destruction necessary.

The owner of the horse brought an action in trover against Behle, before the Supreme Court of the State of New York in the Montgomery County Circuit, for an unlawful conversion of the horse; and judgment was awarded to said owner for damages \$250, and costs \$113.56, total \$363.56.

Charles E. Behle presents a claim, as follows:

"The United States to Charles E. Behle, Dr.

For actual and necessary expenses incurred in a suit of Samuel Donaldson against him for the loss of a horse, while engaged as special examiner, U. S. Pension Office, in Montgomery County, New York, on January 27, 1883, decided against him February 15, 1884, in the Supreme Court at Fonda, N. Y.

		Voucher.	
1883, July 9.	To Chas. S. Nisbet, for preparing undertaking in action of Donaldson v. Behle	1	2 00
1884, Feb. 16.	To J. S. Westbrook, attorney and counsellor, as my attorney, and for his disbursements	2	104 50
1884, Apr. 14	To my draft to defray damages and costs awarded to plaintiff, as per receipt of county clerk	3	363 56
	Total		470 06

Charles E. Behle, being duly sworn, deposes and says, that the above amount is just and true in all respects, that the horse, for whose loss he was sued, was employed by him in his official duties as special examiner solely, and while engaged in the investigation of the pension claim of Frederick Quackenbush, No. 201,063, and [was] destroyed without any fault or neglect on his part, that he had full control of the horse to go to all the places, and especially to the place of one affiant, McLaughlin, on the return from which place the accident happened, and that no part of the above account has been paid by the United States.

CHAS. E. BEHLE,
Special Examiner.

Sworn and subscribed before me this 7th day of May, A. D., 1884.
J. LAWRENCE GETZ, [SEAL]
Notary Public.

Approved, May 9, 1884.

E. G. RATHBONE,
Chief S. Ex. Dir.

Approved, May 9, 1884.

W. W. DUDLEY,
Commissioner of Pensions.

Approved.

M. L. JOSLYN,
Acting Secretary.

May 23, 1884, this claim was disallowed by the First Auditor. It is now presented to the First Comptroller for his action thereon.

The question for decision is—can said claim be lawfully paid?

DECISION BY WILLIAM LAWRENCE, *First Comptroller.*

The claimant is an agent of the United States under the authority of sections 474 and 4744 of the Revised Statutes, as amended by the act

of July 25, 1882 (22 Stat., 175). The appropriation out of which payment is asked is that made by act of March 3, 1883 (22 Stat., 557), as follows:

“For per diem, when absent from home on duty, for traveling examiners, in lieu of expenses of subsistence, not exceeding three dollars per day, and for actual and necessary expenses for transportation, two hundred thousand dollars. And any balance of the appropriation made for this purpose for the fiscal year eighteen hundred and eighty-three remaining unexpended at the close of the current fiscal year be, and the same is hereby, reappropriated and made available for the fiscal year ending June thirtieth, eighteen hundred and eighty-four.”

This act appropriates money “for actual and necessary expenses for transportation” of agents, including the plaintiff. The purpose of Congress evidently was, to provide for paying the usual, proper, and necessary traveling-expenses of such agents. It would be a forced and unnatural construction of the provision above quoted to say that it authorizes payment of the claim in this case. This claim includes attorneys’ fees. They are not expenses of transportation. The claim also includes money paid in satisfaction of a judgment for damages for a tort committed by the claimant. A sum paid for damages for a tort cannot be said to be paid for traveling expenses. Lawful travel on official duty is not a tort. Money can be paid for the *expenses of such travel*, but not for the expenses of a *tort*. The judgment mentioned is, as between the parties to it, conclusive evidence that the defendant therein has been guilty of a *tort* (*Packet Company v. Sickles*, 5 Wall., 592; *Russell v. Place*, 94 U. S., 606; *Gunn v. Plant*, *Id.*, 664; *Cromwell v. County of Sac*, *Id.*, 351; *Davis v. Brown*, *Id.*, 423; *Wells*, *Res Adjudicata* and *Stare Decisis*, Sec. 3; 1 *Greenleaf*, Ev., § 528.) And in law the act of Behle, in riding a hired horse beyond the place to which he was hired to travel, was a tort for all the consequences of which said Behle was liable in damages. Thus, it is said to be a part of the law of bailment:

“That if the thing [hired] is *used for a different purpose* from that which was intended by the parties, or in a different manner, or for a longer period, the hirer is not only responsible for all damages, but, if a loss afterwards occurs, although by inevitable casualty, he will generally be responsible therefor. In short, such misuser is deemed at the common law a *conversion* of the property, for which the hirer is generally held responsible to the latter, to the full extent of his loss.” (Story, *Bailments*, § 413, citing numerous authorities; the Mayor and Council of *Columbus v. Howard*, 6 Ga., 213; 2 *Hilliard*, *Torts*, 3d ed., 526, ch. XLIV, sec. 8.)

A public officer is *personally* liable for such tort (*Wharton*, *Agency*, 547; *Wharton*, *Negligence*, 285). And it is well settled that the Government is not liable for the torts of its officers or agents (*Messenger’s case*, 1 *Lawrence*, *Compt. Dec.*, 2d ed., 160; *Wharton*, *Agency*, 540; *Gibbons v. United States*, 8 Wall., 269; *Cooke et al. v. United States*, 91 U. S., 398; *Whiteside et al. v. United States*, 93 U. S., 257; *Hart v. United States*, 95 U. S., 318; *Langford v. United States*, 101 U. S., 346; *Exporters’ case*, *ante*, 26).

The Revised Statutes provide that in certain specified cases judgments against some designated officers on account of their official acts shall be paid by the Government, and provision is made for the defense of suits in such cases (Rev. Stat., 771, 989, 3220; *Dunnegan's case*, 2 Lawrence, Compt. Dec., 2d ed., 87). In the absence of any statute on the subject, on principles of common law, the Government is not generally liable for judgments recovered against its officers by reason of any non-feasance, misfeasance, or malfeasance.

The claimant seems to insist that the judgment against him was wrongfully rendered, that is, he alleges in the affidavit in support of his claim that the horse mentioned was "destroyed without any fault or neglect on his [the claimant's] part, [and] that he had full control of the horse to go to all the places" to which he did go. This is not equivalent to an averment that his contract of hiring provided that he should have the horse to go to all said places. But assuming that such is what the affidavit was designed to say, still the question remains, does it aid the claim? In presenting the affidavit, the claimant necessarily assumes that the judgment is not, in his application for payment, conclusive evidence that he was guilty of a tort, that is, that, as between him and the Government, the judgment is not conclusive of the facts decided by it (1 Greenleaf, Ev., section 537).

If this be conceded, it does not aid the claimant.

1. There is no appropriation to pay the claim.

2. Inasmuch as the Government is not liable for the torts of its officers, it cannot be liable for the damages lawfully recovered in a judgment founded on a tort. The same rule does not always apply to the Government which applies between private parties as principal and agent. As to these latter, the general rule is, that "agents are entitled * * * to be re-imbursed all advances made in the regular course of a legal employment" (Wharton, Agency, 314; Paley, Agency, by Waterman, 108, citing authorities; 2 Hilliard, Torts, 3d ed., 464, ch. XL, sec. 23). But it has also been said that "an agent cannot, of course, recover [from his principal] disbursements made by him [the agent] without cause" (Wharton, Agency, 315, citing L. 52, D. 17, 1; *Howard v. Tucker*, 1 B. & Ad., 712; *Wolfe v. Horncastle*, 1 B. & P., 323; *Pickering v. Demerit*, 100 Mass., 416; *Day v. Holmes*, 103 Mass., 306). And it has further been said, as to this question, that, in order to enable an agent to recover from his principal for disbursements, "the agent's disbursements must not only be made *ex causa mandati*, but *inculpabiliter*, i. e., that it has not been the agent's fault which has given occasion to the expenditure or loss" (Wharton, Agency, 315, citing Bell, Com., 7th ed., 534; Poth., Mand., 78, *et seq.*; Scott, 9 July, 1752, Elch. Caut., 24; *Watson v. Bruce*, M., 5964; *Huntley v. Sanderson*, 1 Cr. & Mees., 467; *Simpson v. Penton*, 2 *Id.*, 430; *Alexander v. Vane*, 1 M. & W., 511). The judgment against the present claimant is such evidence of fault that, if open to inquiry, it is not disproved by other evidence.

3. If said judgment were *wrongfully* rendered, that is, if, in fact, no tort were committed, and this question is open to inquiry, it may be somewhat difficult to determine the GENERAL PRINCIPLE as to the liability of the Government. In *Stocking v. Sage* (1 Conn., 522), Swift, C. J., said that:—

“Where an agent, acting faithfully, without fault, in the proper service of his principal, is subjected to expense, he [said agent] ought to be reimbursed. If sued on a contract made in the course of his agency pursuant to his authority, though the suit be without cause, and he eventually succeeds, the law implies that the principal will indemnify him, and refund the expense (*Wharton, Agency*, 314, citing *Howes v. Martin*, 1 Esp., 162; *Delaware Ins. Co. v. Delaunie*, 3 Binn., 295; *Frixione v. Tagliaferio*, 10 E. F. Moore, 675).”

But, as already stated, the rules of law applicable between private parties as principal and agent do not always apply as between the Government and its agents. And, in practice, long usage has settled the rule that, generally, the Government only pays judgments rendered against its officers or agents when some statute in terms so requires, and also in those cases in which an appropriation has been made in terms sufficiently clear to indicate a purpose to make such payments. There may be cases in which appropriation acts will be favorably construed so as to indemnify officers or agents against loss arising from a lawful performance of a public duty without fault or negligence (*Wharton, Agency*, 344, 346).

It is a general rule in the law of agency as among private persons and corporations, that a principal is liable to third persons in a civil suit for the torts of his agent in the course of his employment (*Story, Agency*, § 452; *Wharton, Negligence*, 156; *Wharton, Agency*, 475). But the Government as a principal is not so liable. A private principal is generally liable to re-imburse his agent for expenses to which he may be illegally subjected. But the Government as a principal is not so liable. The same rule of public policy, which exempts the Government from liability for the torts of its agent, generally exempts it from any obligation to re-imburse its agent for expenses to which he is unlawfully subjected. The Government does not, in employing an agent, guarantee that he will not be subjected to illegal exactions, judgments, or liabilities, nor does it agree to indemnify him, if he is so subjected.

In some cases an officer may have a just claim on the Government to be re-imbursed for expenses of a litigation to which he has been subjected. Thus, it has been said by Attorney-General Black (9 Op. Att.-Gen., 52), that:

“When an officer of the United States is sued for doing what he was required to do by law, or by the special orders of the Government, he ought to be defended by the Government. This is required by the plain principles of justice as well as by sound policy. No man of common prudence would enter the public service if he knew that the performance of his duty would render him liable to be plagued to death with lawsuits, which he must carry on at his own expense. For this

reason it has been the uniform practice of the Federal Government, ever since its foundation, to take upon itself the defense of its officers who are sued or prosecuted for executing its laws. The following are some of the cases in which this has been done: *Mitchell v. Harmony*, 13 How., 115; *Elliott v. Swartwout*, 10 Pet., 137; *Tracy v. Swartwout*, 10 Pet., 80; *Lawrence v. Allen*, 7 How., 785; *Same v. Caswell*, 13 How., 488; *Greely v. Thompson*, 10 How., 225; *King v. Maxwell*, 17 How., 147; *The United States v. Guthrie*, 17 How., 284; *The United States v. Booth*, 18 How., 476; *Greely v. Burgess*, 18 How., 413; *Stairs v. Peaslee*, 18 How., 521; *Gelston v. Hoyt*, 3 Wheat., 247; *Fleming v. Page*, 9 How., 603; *Kendall v. The United States* 12 Pet., 51; *Marbury v. Madison*, 1 Cr., 137. In *Little v. Barreme*, 2 Cr., 170, the Government took no part in the defense, but it afterwards assumed the judgment, and paid it with interest and all charges.

If an officer sued for doing his duty, carries on his own defense, without appealing to the Government for aid during the pendency of the cause, I think he has a just claim, after it is determined, to be placed in as good a condition as he would have been in, if the Government had taken the defense on itself—in other words, to be paid the sum he is out of pocket. Of course, he is not to be allowed any unreasonable or extravagant expenses." (See *Bliss's case*, *ante*, 38; and 9 Op. Att. Gen., 146.)

The claim presented cannot be paid.

TREASURY DEPARTMENT,

First Comptroller's Office, July 9, 1884.

IN THE MATTER OF A CONSUL'S CLAIM FOR A PAYMENT MADE TO AN INTERPRETER AT A CONSULATE WHERE NO SPECIFIC APPROPRIATION IS MADE FOR SUCH PAYMENT.—CONSUL-INTERPRETER CASE.

1. An appropriation "for contingent expenses of *foreign intercourse* proper, and of all the *missions* abroad," cannot be used to pay contingent expenses of a *consulate*.
2. Mission defined.
3. The provisions made by the act of February 26, 1883 (22 Stat., 424, 425, 429), for the payment of interpreters to the legations and consulates specifically named, by necessary inference prohibit payments for the services of interpreters at *consulates* not so named.
4. The maxim, *expressio unius est exclusio alterius*, applied.
5. A Treasury warrant cannot lawfully be granted by the Secretary of the Treasury, or countersigned by the First Comptroller, which, on the face of the claim on which it is based, is not "warranted by law."

June 3, 1884, a requisition was presented in the Treasury Department, as follows:

To the Secretary of the Treasury:

No. 4093.

DEPARTMENT OF STATE,

Washington, June 3, 1884.

SIR: Please cause a warrant for seventy-six 54-100 dollars to be issued in favor of Lewis Johnson & Co., bankers, Washington, D. C., holders of the annexed two drafts of F. M. Cheney, United States con-

sul at Zanzibar, one for sixty dollars, and the other for sixteen 54–100 dollars, both dated April 1, 1884, payable out of the undernamed appropriations.

“Contingent expenses, foreign missions,” 1884, \$60.

“Contingent expenses, United States consulates,” 1884, \$16.54. The said F. M. Cheney to be charged accordingly on the books of the Treasury.

\$76.54.

FRED’K T. FRELINGHUYSEN,
Secretary of State.

One of the drafts is as follows:

No. 8.

\$60. CONSULATE UNITED STATES OF AMERICA,
At Zanzibar, April 1st, 1884.

Fifteen days after sight (acceptance waived and endorsements by procurement excepted) of this First of Exchange (second unpaid) pay to the order of George A. Cheney, esq., sixty 00–100 dollars value received and charge the same to account *for salary of interpreter.*

F. M. CHENEY,
Consul.

To the SECRETARY OF STATE,
Washington, D. C.

This draft was duly indorsed by the payee to Lewis Johnson & Co. No question is made as to the payment of the draft for \$16.54, mentioned in the requisition. The requisition and drafts were informally submitted to the First Comptroller for his views.

March 31, 1884, F. M. Cheney, United States Consul at Zanzibar, Africa, transmitted to the Department of State an account, charging the United States with \$60 for “salary of Tohani Vin Saif, as interpreter, from October 1, 1883, to March 31, 1884, as per instructions from the Secretary of State, at \$10 per month,” and showing that the draft for \$60 was drawn therefor as stated. June 17, 1884, this account was transmitted to the Fifth Auditor by the Second Assistant Secretary of State, “to be charged to the appropriation for Contingent Expenses, Foreign Missions, 1884.” June 24, 1884, the Fifth Auditor adjusted the account between the United States and said Cheney, consul, finding him entitled to a credit of \$60 on account of said sum paid to the interpreter.

On the same day the Auditor transmitted the account to the First Comptroller, calling his “attention to the item of interpreter’s pay,” saying, “if this is to be a regular expense, it is suggested whether it should not be provided for in the appropriation for interpreters,” and further suggesting “that the Department of State may be requested to cause provision to be made for it in said interpreters’ appropriation in order to its continued allowance.” The question is, thus, presented to the First Comptroller, to decide whether said sum of \$60 can be allowed in settling the accounts of the consul.

DECISION BY WILLIAM LAWRENCE, *First Comptroller*.

There are two reasons why the warrant cannot lawfully issue, as requested, for the payment of the draft for \$60, to re-imburse the Consul at Zanzibar for the payment made to his interpreter, which also show that such items as this for \$60, charged in the account of the Consul for payment of the interpreter, cannot generally be allowed.

I. The appropriation, out of which it is asked that payment be made, is not applicable thereto, being the appropriation made by the act of February 26, 1883 (22 Stat., 425), "for contingent expenses of foreign intercourse proper, and of all the *missions* abroad, eighty-five thousand dollars." The same act (22 Stat., 429) makes an appropriation, as follows:

"For contingent expenses of United States consulates, such as stationery, book-cases, arms of the United States, seals, presses, and flags, rent, freight, postage, and other necessary miscellaneous matters, one hundred and ten thousand dollars."

The Revised Statutes provide, as follows:—

"SEC. 1674. The official designations employed throughout this Title shall be deemed to have the following meanings, respectively:

First. 'Consul-general,' 'consul,' and 'commercial agent,' shall be deemed to denote full, principal, and permanent consular officers, as distinguished from subordinates and substitutes.

Second. 'Deputy consul' and 'consular agent' shall be deemed to denote consular officers subordinate to such principals, exercising the powers and performing the duties within the limits of their consulates or commercial agencies respectively, the former at the same ports or places, and the latter at ports or places different from those at which such principals are located respectively.

Third. 'Vice-consuls' and 'vice commercial agents' shall be deemed to denote consular officers, who shall be substituted, temporarily, to fill the places of consuls-general, consuls, or commercial agents, when they shall be temporarily absent or relieved from duty.

Fourth. 'Consular officer' shall be deemed to include consuls-general, consuls, commercial agents, deputy consuls, vice-consuls, vice-commercial agents, and consular agents, and none others.

Fifth. 'Diplomatic officer' shall be deemed to include ambassadors, envoys extraordinary, ministers plenipotentiary, ministers resident, commissioners, *chargés d'affaires*, agents, and secretaries of legation, and none others."

All of the legislation of Congress, and all the books on international law, recognize the distinction between strictly *diplomatic service* and *consular service*. The appropriation "for contingent expenses of *foreign intercourse proper*, and of all the *missions abroad*," out of which it is asked that the draft in question be paid, was not intended for expenses incurred by a consul in his strictly consular capacity, or for expenses relating to his duties as such. For the purposes now under consideration a mission may be defined to be (1) the place to which a Minister is sent, (2) the duty with which a Minister is charged, or, as Webster says, (3) "the act of sending, or the state of being sent; a being sent

or delegated by authority, with certain powers for transacting business ; commission ; as sent on a foreign mission."

"Foreign intercourse proper" is conducted by Ministers. The consular service proper is of a different character.

II. Payment cannot lawfully be made from the appropriation "for contingent expenses of the United State consulates" (Act of February 26, 1883, 22 Stat., 429).

"*Interpreters*" both to *legations* and to *consulates* of the United States are appointed under specific authority of law, as will be seen by reference to sections 1678, 1679, 1680, 1692, and 1693 of the Revised Statutes; and annual specific appropriations are made by Congress, for the "*salaries of the interpreters*" to certain legations and consulates of the United States, named, specified, or otherwise designated, in the appropriation acts.

The act of February 26, 1883 (22 Stat., 424, 425, 429), making appropriations for the consular and diplomatic service of the Government for the fiscal year which ended June 30, 1884, provides for "*salaries of the interpreters*," to the legations and consulates of the United States *specifically named or designated* in said act. No provision is therein made for the *salary* or pay of an interpreter to the United States consulate at Zanzibar, nor has there been any provision made for the pay of an interpreter to this consulate by any former act of Congress.

The *express* provisions in the act of February 26, 1883 (22 Stat., 424, 425, 429), for "*salaries of the interpreters*" to the several legations and consulates specifically named, and in the countries designated, and the omission to make any such provision for an interpreter to the consulate at Zanzibar, are conclusive evidence that Congress did not intend that money should be expended to pay for *continuous service* of an interpreter to the latter consulate. The maxim clearly applies—*Expressio unius est exclusio alterius*.

A question similar in principle was decided in *United States v. Morse* (3 Story, 87, 89). In that case it appeared that in 1836 Morse was collector of customs, and Balkam was inspector of customs, both in the district of Passamaquoddy, and both receiving a salary. Balkam also held the office of deputy collector at the same time and place. One question was, "whether the deputy collector could be appointed as inspector, and hold both offices at the same time, and receive the emoluments thereof, under the Act of 7th of May, 1822" (3 Stat., 695, Sec. 14)!

Story, J., said, as to this question, that :

"It appears to me to be too clear for argument.

* * * * *

The fourteenth section of the act of 1882, ch. 107, declares 'that, in the ports of Boston, New York, Philadelphia, Baltimore, Charleston, Savannah, and New Orleans, no person shall be an inspector who, at the same time, holds any other office in the collection of the customs in either of the said ports.' Now the very enumeration here includes only

certain specified ports, and, of course, excludes all other ports, upon the known maxim, *Expressio unius est exclusio alterius*. The policy of the section doubtless was, that, in the enumerated ports, the duties of deputy collector would or might occupy all the time of that officer, and that it would be a public inconvenience, and, perhaps, lead to the gross abuse of creating sinecures, to allow him to hold another office at the same time, the duties whereof he could not adequately perform, or might injuriously to the public service neglect."

So in the present case it may be said that the act of February 26, 1883, in making specific appropriations for "salaries of the interpreters," "includes only certain specified" legations, consulates, and countries, named, and, "of course, excludes all other" legations, consulates, and countries, "upon the known maxim" already mentioned.

It is unnecessary to inquire whether an interpreter can be paid for a brief, contingent, and special service. The service for which compensation is asked was continuous, not temporary or casual. The requisition and draft now in question show on their faces that the latter is intended to make the unauthorized payment mentioned. A warrant cannot, as a general rule, lawfully be granted or countersigned for such purpose so apparent.

To a certain extent payments have heretofore been allowed in cases somewhat similar to this; and a change of usage should generally be made only prospectively.

Hereafter, in cases of this kind, payments cannot be made.

TREASURY DEPARTMENT,

First Comptroller's Office, July 12, 1884.

IN THE MATTER OF THE RIGHT OF A MARSHAL TO MILEAGE ON EACH OF SEVERAL WRITS IN HIS HANDS AT THE SAME TIME, REQUIRING HIM TO GO TO THE SAME PLACE OR IN THE SAME DIRECTION—MARSHAL'S CONSTRUCTIVE MILEAGE CASE.

1. Under the act of February 22, 1875 (18 Stat., 334, sec. 7), a marshal is only entitled to one mileage for serving for the United States several writs in his hands at the same time, requiring him to go to the same place or in the same direction—whether such writs were issued in the same case, or in different cases pending in the same court—and including subpoenas for witnesses to testify generally.
2. *Subpoena case* (2 Lawrence, Compt. Dec., 2d ed., 286) reaffirmed.
3. *United States v. Ralston* (17 Federal Reporter, 895; s. C., 4 Lawrence, Compt. Dec., 507) reaffirmed.
4. Construction given to sections 823, 829, and 877 of the Revised Statutes, and to the act of February 22, 1875 (18 Stat., 334, sec. 7).

In settling the accounts of United States marshals in the office of the First Comptroller questions are presented whether a marshal (who on one travel serves in one locality, or in the same direction, differ-

ent writs issued out of a court), is entitled to two or more mileages in such cases as the following:

- (1) When he serves two or more writs of *capias* on the same person accused of different crimes or offenses;
- (2) When he serves two or more of such writs on different persons separately charged or indicted;
- (3) When he serves such writ of *capias* on one person, and a subpoena for one or more witnesses to testify in the case against him;
- (4) When he serves such writ of *capias* on one person, and a subpoena for one or more witnesses to testify in a criminal case wherein another person is charged with a crime.

—

DECISION BY WILLIAM LAWRENCE, *First Comptroller*.

The questions presented for decision require a construction of sections 823, 829, and 877 of the Revised Statutes, and also of the act of February 22, 1875 (18 Stat., 334, sec. 7). Said section 829 of the Revised Statutes gives a marshal fees, as follow:

For travel in going only, to serve any process, warrant, attachment, or other writ, including writs of subpoena in civil or criminal cases, six cents a mile, to be computed from the place where the process is returned to the place of service, or, when more than one person is served therewith, to the place of service which is most remote, adding thereto the extra travel which is necessary to serve it on the others. But when more than two writs of any kind required to be served in behalf of the same party on the same person might be served at the same time, the marshal shall be entitled to compensation for travel on only two of such writs; and to save unnecessary expense it shall be the duty of the clerk to insert the names of as many witnesses in a cause in such subpoena as convenience in serving the same will permit. * * *

Section 877 provides that—

Witnesses who are required to attend any term of a circuit or district court on the part of the United States, shall be subpoenaed to attend to testify generally on their behalf, and not to depart the court without leave thereof, or of the district attorney; and under such process they shall appear before the grand or petit jury, or both, as they may be required by the court or district attorney.

In the subpoena case (2 Lawrence, Compt. Dec., 2d ed., 287) it was decided, as to plural subpoenas for witnesses, that—

The marshal is entitled to but one mileage for all Government witnesses served in one locality or direction at the same time, no matter how many writs of subpoena he may have, or what may be their form.

In the same case (*Id.*, 300) it was said that—

The act of February 22, 1875 [18 Stat., 334, sec. 7], does not change the rate or mode of computing mileage on writs served by marshals. It prohibits both constructive mileage on writs transmitted to and served by Deputy Marshals, and mileage for travel not necessarily performed.

In *United States v. Ralston*, tried in the Circuit Court of the United States for the Western District of Virginia, September Term, 1883 (17 Federal Reporter, 895; s. c., 4 Lawrence, Compt. Dec., 507), the question was presented whether a Marshal was entitled to mileage, as follows:—

“Item 46. Forty-two miles to Tazewell County, to serve subpoena in *United States v. Wallace*, disallowed [by the First Comptroller]; the same travel being charged to arrest in the same trip.”

Hughes, J., in deciding this question, referred to the decision made by the First Comptroller in Subpoena case (2 Lawrence, Compt. Dec., 2d ed., 286), and said that:

“Although this particular decision of the Comptroller referred only to plural subpoenas for witnesses, it, *in principle* embraces the disallowance 46 (cited above as an example), and inhibits the charge for mileage in serving a subpoena in any case where, at the same time and in the same journey, mileage has been charged for serving a writ of arrest.

“I am free to say that I entirely concur in the views of the Honorable Comptroller in the decision referred to, so far as it relates to double mileages in cases embraced by the terms of the act of 1875.”

And the learned judge cites the act of February 22, 1875 (18 Stat., 334, sec. 7) as prohibiting “all duplicate charges of mileage for the same journey.” As to the same act the Acting Attorney-General (15 Op. Att.-Gen., 109) said that:—

“Under this act, in my opinion, there can be but one charge for mileage upon several writs (subpoenas, &c.), in hand at the same time, requiring a marshal to travel to the same place or in the same direction.

If a marshal have in hand several writs (subpoenas, &c.) against the same person or different persons living at A, he will charge mileage but once. If he have several writs, &c., against different persons living at either A, B, or C, which are (say) in the same direction, he will charge one mileage only to A, one mileage from A to B, and one mileage from B to C.

No matter how many precepts a marshal may have in his hands requiring him to go to the same place, or in the same direction, he makes but one *actual and necessary travel* in serving them; for instance, in the second case above the marshal made one *actual* and nine *constructive* travels. The act of 1875 puts an end to the notion that the latter are performances for which the marshal is to be compensated.”

The *principle* thus decided by the learned judge, and held by the Acting Attorney-General is, that, within the purpose and meaning of the act of February 22, 1875 (18 Stat., 334, sec. 7), a marshal with several writs in his hands at the same time, in the same or in different cases, requiring him to go to the same place, or in the same direction, makes but one actual and necessary travel in serving them, and, so, is entitled to but one mileage. By a proviso in the first section of the act of June 16, 1874 (18 Stat., 72), it was enacted:

“That only actual traveling expenses shall be allowed to any person holding employment or appointment under the United States, and all allowances for mileage and transportation in excess of the amount actually paid are hereby declared illegal. * * *”

This enactment was held to apply to marshals, and, therefore, to supersede the provision in section 829 of the Revised Statutes allowing mileage to those officers (14 Op. Att.-Gen., 681; 16 *id.*, 166).

But, subsequently, by the seventh section of the act of February 22, 1875 (18 Stat., 334), Congress declared:

"That the proviso in * * * [the act of June 16, 1874, cited above] shall not be construed to apply or to have applied to attorneys, marshals, or clerks of courts of the United States, their assistants or deputies. * * * And from and after the first day of January, eighteen hundred and seventy-five, no such officer or person shall become entitled to any allowance for mileage or travel not actually and necessarily performed under the provisions of existing law." (16 Op. Att.-Gen., 166.)

This latter clause of the act of February 22, 1875 (18 Stat., 334, sec. 7), was, thus, clearly intended to impose a *limitation* on charges for mileage as previously made under section 829 of the Revised Statutes, and especially on charges for *all constructive* mileage—that is, for travel never, or not necessarily, performed.

When a Marshal with several writs in his hands travels in one direction to serve one of them on the most remote person to be served, it cannot be said that there is any travel "*actually and necessarily performed*" for serving the others on persons residing at intermediate points along the route. Such Marshal must go to each of the intermediate points in order to reach the most remote person served. The travel, as to the persons served at such points, is entirely *constructive*, as much so as if the writs were respectively delivered to the Marshal at the intermediate places of service. The same reason and policy which deny the right to constructive mileage on writs sent by mail, equally apply when the writs are served at intermediate points on a trip to serve one at a more remote point. Charges for constructive travel for reaching such intermediate points are as much of an abuse as charges for constructive travel on writs sent by mail. To say that Congress intended to prohibit the latter abuse, but not the former, is, by construction, to *limit*, beyond the reasonable effect of its words, the operation of a beneficial statute—which is entitled to a *liberal* construction to effect its object—and is to create a distinction without any difference in principle or purpose. The evil to be remedied and the mischief to be suppressed by the act of February 22, 1875 (18 Stat., 334, sec. 7), were the charges for travel never in fact performed, or not necessarily performed, in serving writs. In *Lyde v. Barnard* (1 M. & W., 114) it is said that "we must always construe an act so as to suppress the mischief" (*Potter's Dwarria*, Stat., 185; *Hart v. Cleis*, 8 Johns., 44; *Sedgwick, Construction Stat. and Const. L.*, 2d ed., 308). *Bishop* (*Written Laws*, 192) says that—

"The law * * * loves honesty and fair-dealing, so construes liberally statutes to suppress frauds, as far as they annul the fraudulent transaction; and, generally, it employs a liberal interpretation for such written laws as operate beneficially for those whom they immediately concern." See *Prescott v. Otterstatter* (85 Pa. St., 534).

If the right to such constructive mileage can be said to be doubtful, the statute is to be construed against it. Statutes giving costs, or fees as costs, are, because in derogation of the common law, to be strictly construed (Contempt case, *ante*, page 255; Meigs's case, 4 Lawrence, Compt. Dec., 628).

The court in taxing costs can make an apportionment of the mileage for serving several writs on one travel in the same direction, so as to do justice to all parties.

The *subpœna* case (2 Lawrence, Compt. Dec., 2d ed., 286) did not involve the precise question or questions presented in this case. The *principle* decided in that case is, however, substantially the same as that now established. Nothing said in that case is in conflict with the rule applied in this case.

On the several writs in the hands of a Marshal at the same time, requiring him to go to the same place or in the same direction, only one mileage will be allowed. This rule will be applied in all cases, commencing with the current fiscal year, and in all cases in which Marshals have not paid deputies plural mileages under, and on the faith of, any prior usage.

TREASURY DEPARTMENT,

First Comptroller's Office, July 14, 1884.

IN THE MATTER OF THE STATEMENT OF THE ACCOUNTS OF THE DISBURSING CLERK OF THE POST-OFFICE DEPARTMENT, AND OF THOSE OF THE SAME PERSON AS SUPERINTENDENT OF THE POST-OFFICE BUILDING.—BURNSIDE'S CASE.

1. The First Auditor has jurisdiction of all accounts not specifically, or by reasonable inference, assigned by statute to some other Auditor. Sister Elizabeth's case (2 Lawrence, Compt. Dec., 2d ed., 120) followed and approved.
2. The accounts of the disbursing clerk of the Post-Office Department, for disbursements of appropriations to pay salaries of officers and employés in the Post-Office Department, are to be settled by the First Auditor and First Comptroller; the accounts for disbursements of contingent expenses in said Department are to be settled by the Fifth Auditor and First Comptroller.
3. The practice stated, as to *advances* of public money to the disbursing clerk of the Post-Office Department, and as to requisitions therefor.
4. Section 3522 of the Revised Statutes *recognizes*, and, so, *requires*, an examination by proper authority in the Post-Office Department, of the monthly accounts and vouchers in support thereof, of the disbursing clerk of said Department, *before* they "shall be passed to the proper accounting officer of the Treasury [Department] for settlement."
5. The [Sixth] Auditor of the Treasury for the Post-Office Department has the sole authority to settle and adjust the accounts of the Superintendent of the Post-Office building for waste paper and other old materials sold by him; to certify a balance against him in favor of the United States; and to superintend the collection of the same.

6. The effect of the account so settled, when offered as evidence in court, considered.
7. The Postmaster-General has authority to devolve on the Superintendent of the Post-Office building the duty of selling waste paper and other old material.
8. Sections 161, 183, 193, 236, 273, 277, 292, 293, 298, 317, 362, 368, 369, 371, 388, 397, 444, 651-656, 666, 1241, 3618, 3622, 3648, 3660-3665, 3668, 3669, 3672-3674, 3677, 3692, 4050, of the Revised Statutes examined and construed.

February 2, 1875, James O. P. Burnside, having been appointed disbursing clerk of the Post-Office Department, and Superintendent of the Post-Office building, gave bonds to the United States with H. M. Hutchinson, Wm. Rutherford, E. C. Ingersoll, Wash. B. Williams, and John Coughlin, as sureties, in a penalty of \$40,000, conditioned as follows:

"If the said James O. P. Burnside shall, truly and faithfully, execute and discharge all the duties of said office of Superintendent of the Post-Office building and disbursing clerk according to the laws of the United States, and shall truly and faithfully keep safely, and disburse and pay out all sums of public money placed in, or coming into his hands, from time to time, without loaning, using, depositing in bank, or exchanging for other funds than as by law allowed, and shall do and perform all other duties as Superintendent of the Post-Office building and disbursing clerk which may be imposed on him by any act of Congress, or by any regulation of the Post-Office Department, made in conformity to law, then this obligation to be void and of none effect; otherwise it shall abide and remain in full force and virtue."

October 2, 1875, said Burnside gave another bond of like tenor and effect in a penalty of \$40,000, with H. M. Hutchinson, N. S. Jeffries, and E. C. Ingersoll, as sureties. May 28, 1884, Burnside was removed from said office. June, 1884, on the settlement, in the office of the First Comptroller, of the accounts of the said disbursing clerk, to May 28, 1884, it was ascertained that he was in arrears to the United States in the sum of \$45,734.63, the deficiency commencing in the calendar year 1882, and continuing up to the time of his removal. During each year Burnside was in office, he, as Superintendent of the Post-Office building, in pursuance of a long continued usage approved by the Postmaster-General (Rev. Stat., Sec. 161), sold waste paper and other old material (Rev. Stat., Sec. 3618, 3672, 3692, 4050). No account was kept in the Post-Office Department of such sales, or of the moneys deposited in the Treasury and arising therefrom, unless it were kept by said Burnside, and, if so, it cannot be found.

A statement, made up in the Post-Office Department from *original sources of evidence* as nearly correct as practicable, shows Burnside to be in arrears on account of such sales and deposits to the amount of \$29,649.45, the deficiency commencing in November, 1876, and increasing each year since.

June 28, 1884, the Postmaster General addressed a letter to the Secretary of the Treasury, requesting "that the account of J. O. P. Burnside, late disbursing clerk and superintendent * * * be charged in the sum of \$29,312.63, for old material, waste paper, &c., sold, which he has failed to account for, as per statement enclosed herewith." This letter was informally submitted to the First Comptroller for an opinion.

OPINION BY WILLIAM LAWRENCE, *First Comptroller.*

The Revised Statutes contain the following provisions:—

"SEC. 161. The head of each Department is authorized to prescribe regulations, not inconsistent with law, for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it."

"SEC. 193. The head of each Department shall make an annual report to Congress, giving a detailed statement of the manner in which the contingent fund for his Department, and for the Bureaus and offices therein, has been expended, giving the names of every person to whom any portion thereof has been paid; and if for anything furnished, the quantity and price; and if for any service rendered, the nature of such service, and the time employed, and the particular occasion or cause, in brief, that rendered such service necessary; and the amount of all former appropriations in each case on hand, either in the Treasury or in the hands of any disbursing officer or agent. And he shall require of the disbursing officers, acting under his direction and authority, the return of precise and analytical statements and receipts for all the moneys which may have been from time to time during the next preceding year expended by them, and shall communicate the results of such returns and the sums total, annually, to Congress."

"SEC. 236. All claims and demands whatever by the United States or against them, and all accounts whatever in which the United States are concerned, either as debtors or as creditors, shall be settled and adjusted in the Department of the Treasury."

The duties of the Auditors shall be as follow:

* * * * *

"SEC. 277. Seventh. The Sixth Auditor shall receive all accounts arising in the Post-Office Department, or relative thereto, with the vouchers necessary to a correct adjustment thereof, and shall audit and settle the same and certify the balances thereon to the Postmaster-General. He shall keep and preserve all accounts and vouchers after settlement. He shall close the account of the Department quarterly, and transmit to the Secretary of the Treasury quarterly statements of its receipts and expenditures. He shall report to the Postmaster-General, when required to do so, the manner and form of keeping and stating the accounts of the Department, and the official forms of papers to be used in connection with its receipts and expenditures. He shall report to the Postmaster-General all delinquencies of postmasters in rendering their accounts and returns, or in paying over money-order funds and other receipts at their offices. He shall register, charge, and countersign all warrants upon the Treasury for receipts or payments issued by the Postmaster-General, when warranted by law. He shall perform such other duties in relation to the financial concerns of the Department as may be assigned to him by the Secretary of the Treasury, and make to the Secretary or to the Postmaster-General such reports respecting the same as either of them may require. [See § 270.]"

"SEC. 292. The Sixth Auditor shall superintend the collection of all debts due the Post-Office Department, and all penalties and forfeitures imposed for any violation of the postal laws, and take all such other measures as may be authorized by law to enforce the payment of such debts and the recovery of such penalties and forfeitures. He shall also superintend the collection of all penalties and forfeitures arising under

other statutes, where such penalties and forfeitures are the consequence of unlawful acts affecting the revenues or property of the Post-Office Department.”*

“SEC. 296. In case of delinquency of any postmaster, contractor, or other officer, agent, or employé of the Post-Office Department, in which suit is brought, the Sixth Auditor shall forward to the Department of Justice certified copies of all papers in his office tending to sustain the claim.”

“SEC. 3618. All proceeds of sales of old material, condemned stores, supplies, or other public property of any kind, except the proceeds of the sale or leasing of marine hospitals, or of the sales of revenue-cutters, or of the sales of commissary stores to the officers and enlisted men of the Army [or of materials, stores, or supplies sold to officers and soldiers of the Army], or of the sale of condemned Navy clothing, or of sales of materials, stores, or supplies to any exploring or surveying expedition authorized by law, shall be deposited and covered into the Treasury as miscellaneous receipts, on account of ‘proceeds of Government property,’ and shall not be withdrawn or applied, except in consequence of a subsequent appropriation made by law.”

“SEC. 3622. Every officer or agent of the United States who receives public money which he is not authorized to retain as salary, pay, or emolument, shall render his accounts monthly. Such accounts, with the vouchers necessary to the correct and prompt settlement thereof, shall be sent by mail, or otherwise, to the Bureau to which they pertain, within ten days after the expiration of each successive month, and, after examination there, shall be passed to the proper accounting officer of the Treasury for settlement. Disbursing officers of the Navy shall, however, render their accounts and vouchers direct to the proper accounting officer of the Treasury. In case of the non-receipt at the Treasury, or proper Bureau, of any accounts within a reasonable and proper time thereafter, the officer whose accounts are in default shall be required to furnish satisfactory evidence of having complied with the provisions of this section. The Secretary of the Treasury may, if in his opinion the circumstances of the case justify and require it, extend the time hereinbefore prescribed for the rendition of accounts. Nothing herein contained shall, however, be construed to restrain the heads of any of the Departments from requiring such other returns or reports from the officer or agent, subject to the control of such heads of Department, as the public interest may require. [See § 5491.]”

“SEC. 3672. A detailed statement of the proceeds of all sales of old material, condemned stores, supplies, or other public property of any kind [except materials, stores, or supplies sold to officers and soldiers of the Army, or to exploring or surveying expeditions authorized by law] shall be included in the appendix to the book of estimates.”

“SEC. 3692. All moneys received from the leasing or sale of marine hospitals, or the sale of revenue-cutters, or from the sale of commissary stores to the officers and enlisted men of the Army [or from the sale of materials, stores, or supplies sold to officers and soldiers of the Army], or from sales of condemned clothing of the Navy, or from sales of materials, stores, or supplies to any exploring or surveying expedition authorized by law, shall respectively revert to that appropriation out of which they were originally expended, and shall be applied to the purposes for which they are appropriated by law.”

“SEC. 4050. Unclaimed money in dead letters for which no owner can be found; all money taken from the mail by robbery, theft, or otherwise, which may come into the hands of any agent or employé of the

United States, or any other person whatever; all fines and penalties imposed for any violation of the postal laws, except such part as may by law belong to the informer or party prosecuting for the same; and all money derived from the sale of waste paper or other public property of the Post-Office Department, shall be deposited in the Treasury, under the direction of the Postmaster-General, as part of the postal revenue. And the Postmaster-General shall cause to be placed to the credit of the Treasurer of the United States, for the service of the Post-Office Department, the net proceeds of the money-order business; and the receipts of the Post-Office Department derived from this source during each quarter shall be entered by the Sixth Auditor in the accounts of such Department, under the head of 'revenue from money-order business.'"

The regulations of the Post-Office Department (1879, page 39, Sec. 27), contain the following provision:—

"DISTRIBUTION OF THE BUSINESS OF THE DEPARTMENT.—That the business of the Department may be conveniently arranged and prepared for the final action of the Postmaster-General, it is distributed among its several officers as follows: * * * ; the office of the superintendent and disbursing clerk, to which is assigned the supervision of all repairs, the care of the public property in and the furnishing of the departmental building, and the disbursement of the salaries of the officers and employés of the Department. * * *"

Appropriations have been made annually for the payment of the salaries of the officers and employés of the "Executive Department known as the Post-Office Department" in Washington City, and for contingent expenses thereof. The act of March 3, 1883 (22 Stat., 560), is an example of such appropriations. The Disbursing Clerk of the Department disburses appropriations so made. (1 Lawrence, Compt. Dec., 2d ed., *Introd.*, IX.)

I. The accounts of the Disbursing Clerk, as to salaries in the "Executive Department known as the Post-Office Department" (Rev. Stat., 388), are properly settled by the First Auditor and First Comptroller; and the accounts of contingent expenses in said Department are settled by the Fifth Auditor and First Comptroller. The Statute does not, *in terms*, give the First Auditor jurisdiction of the former accounts. (Rev. Stat., 277, cl. First; 1 Lawrence, Compt. Dec., 2d ed., *Introd.*, IX.) But he has jurisdiction generally over all accounts not specifically, or by reasonable inference, assigned by statute to some other Auditor. (Sister Elizabeth's case, 2 Lawrence, Compt. Dec., 2d ed., 120.)

In this connection, it may be proper to state the manner in which advances are made to the Disbursing Clerk, and some of the safeguards relative to his disbursements. If these are not adequate, the proper remedy can be applied by regulations or legislation.

Advances of money are made in pursuance of statute and of general orders of the President (Rev. Stat., 3648; 1 Lawrence, Compt. Dec., 2d ed., Appendix, 638; Inspectors' case, 1 Lawrence, Compt. Dec., 2d ed., 201, 207; Bender's case, *Id.*, 354.)

By a usage so long continued that it may be regarded as executive

common law, and in accordance with the principle of statutory requirements directly applicable to the Departments of Justice (Rev. Stat., 369, 371), of the Interior (Rev. Stat., 444), of War, of the Navy (Rev. Stat., 273, 3673), and of Agriculture (Rev. Stat., 3677), money has been, and is, advanced to the Disbursing Clerk of the Post-Office Department on the requisitions of the Postmaster-General. See Rev. Stat., 3674; Bender's case, 1 Lawrence, Compt. Dec., 2d. ed., 354; McKnight's case, 13 Ct. Cl., 300.

As to the accounts of the Disbursing Clerk of the Post-Office Department, and some other like officers, the statute expressly provides that:

"Such accounts, with the vouchers necessary to the correct and prompt settlement thereof, shall be sent by mail, or otherwise, to the Bureau to which they pertain, within ten days after the expiration of each successive month, and, after examination there, shall be passed to the proper accounting officer of the Treasury for settlement. Disbursing officers of the Navy shall, however, render their accounts and vouchers direct to the proper accounting officer of the Treasury." (Rev. Stat., 3622.)

This provision is general in terms, with no implied limitation, and, so, is to be construed as embracing all disbursing officers not otherwise excepted. Thus, the accounts of the Disbursing Clerk are required to be *examined by proper authority in the Post-Office Department, before they* "shall be passed to the proper accounting officer of the Treasury for settlement." The statute clearly contemplates *such examination, recognizes* the existence of the duty to make it, and, thus, imposes it, since the recognition of a power or duty by statute is generally equivalent to the grant of such power and the imposition of such duty (Bliss's case, *ante*, 38).

"What is *implied* in a statute is as much a part of it as what is expressed." (United States v. Hodson, 10 Wall., 406; United States v. Babbit, 1 Black, 55, 61.)

The head of each Department, in which accounts of disbursements are thus required to be made, must necessarily know the condition of the accounts of the Disbursing Clerk, in order to make the report of expenditures required by the statute (Rev. Stat., 193, 3660-3665, 3668, 3669). Express provision is made as to some of the Departments for a bureau of accounts and for their examination, in order to carry out the purposes of section 3622 of the Revised Statutes (Consular-Accounts case, 3 Lawrence, Compt. Dec., 349; Consular-Draft case, *ante*, 88; Act of March 3, 1875—18 Stat., 349; Rev. Stat., 362, 368). In all the Departments, under the authority to make regulations, the duty to examine accounts may be assigned to the proper clerks or officers.

The requisitions for money, made by the Postmaster-General in favor of his Disbursing Clerk, do not pass through the office of any Auditor or Comptroller for approval or recommendation, as some other requisitions do. Thus, "*requisitions*" from the War and Navy Departments (Rev. Stat., 3673) are to be countersigned by the Second Comptroller,

In the case of many disbursing officers, clerks, and agents, money is advanced on *their* respective requisitions, and not on requisitions by the head of a Department. In *such cases*, the practice is, to submit the requisitions to the proper Auditor and Comptroller for their reports showing the condition of the accounts of such disbursing officers, after which, if deemed proper, accountable warrants issue for advances of money (1 Lawrence, Compt. Dec., 2d ed., Appendix, 656).^{*} If the law required this as to all requisitions, it would furnish some additional safe-guards.

[5679 stamp.]

OFFICE OF THE COLLECTOR OF U. S. INTERNAL
REVENUE AND DISBURSING AGENT OF THE TREASURY
FOR THE 6TH DISTRICT OF OHIO,

For full instructions relative to form No. 42, see "Series 7, No. 2, Revised."	Amount asked for by collector.	Amount advanced by Department.
Pay of 3 storekeepers, 25 days each, at \$4 per day (including Sunday duty).	300	500
* Pay of 2 storekeepers and gangers, 25 days each, at \$4 per day (including Sunday duty)	200	
Allowance to collector for salary and expenses for the month of June, 1884.	1,478	1,478
Total	1,978	1,978
Deduct cash on hand available to pay bills covered by this estimate, as follows:		
+ Money advanced for pay of storekeepers, &c.....	4	4
(See Note 3.) Money advanced for salary deputy or clerk from to , } at \$ per annum.		
Balance required	1,974	1,974

† Warehouse of C. W. Overaker (No. 16) discontinued, to take effect at close of business May 30, 1884

GEO. P. DUNHAM,
Collector and Disbursing Agent.

3. "Cash on hand" should be deducted the last month in each quarter only. If arising from a vacancy in force, the name, period, and annual salary should be stated

Inasmuch as the requisitions of the Postmaster-General and of other heads of Departments do not pass through the office of any Auditor and Comptroller so as to require recommendation thereon, and inasmuch as the accounts of the Disbursing Clerk of the Post-Office Department are to be first examined in said Department (Rev. Stat., 3622), and as such Clerk is subject to the control of the head of that Department and to "regulations" by him prescribed, and as no officer of the Treasury Department has any control over such Disbursing Clerk, it reasonably follows that the accounting officers are not charged with the duty of ascertaining the condition of his accounts, except as this may be involved in the only duties required of such officers, or authority given to them, which are: (1) to settle his current accounts as presented; (2) to make a final settlement when it is shown to be necessary for the First Comptroller to superintend the recovery of any debt certified by him to be due to the United States, as provided in clause fourth of section 269 of the Revised Statutes; and, perhaps, incidentally, (3) to call for accounts for settlement, if not presented in due time.

If it be said that the monthly or quarterly settlements of the accounts will show balances in the hands of such Disbursing Clerk, still the accounting officers must necessarily presume that requisitions have been made for only such amounts of money as were necessary and proper, and that any balance on hand may be required to meet legally accrued claims not yet presented for payment, especially, since an appropriation remains available for two years after the close of the fiscal year for

herein. If from other causes, the facts should be briefly stated in the blank space provided. If arising from unexpended allowances to deputies for travelling expenses, it should be deducted in estimate for June only.

"DIVISION OF ACCOUNTS.

(Form 42.)

6th collection district, Ohio, Geo. P. Dunham, collector.
 Estimate of expenses for June, 1884.
 Requisition for \$1,974.

OFFICE OF INT. REV., June 19, 1884.

Requisition approved for \$1,974.
 Vouchers in this office amounting to \$4,644.60.
 All reports rendered by collector, or delay satisfactorily explained.

H. C. ROGERS,
Deputy Commissioner

Referred to Fifth Auditor.

FIFTH AUDITOR'S OFFICE, June 19, 1884.

Last adjustment No. 19,324-5.
 Balance due collector, \$96.52.
 Vouchers on hand amounting to \$7,173.75, March qr.

D. S. ALEXANDER,
Auditor.

Referred to the Register.

REGISTER'S OFFICE, June 20, 1884.

Adv'd to coll's since adjustment 8,142.52
 above referred to 3,584.

J. H. BEATTY,
for Register.

Referred to the First Comptroller.

which it has been made, and payment of such claims may be demanded at any time within that period (Mississippi Central Railroad Co.'s case, 4 Lawrence, Compt. Dec., 566, *note*). If the law required *all* disbursing officers, except those appointed by the President, to be appointed by *one* authority—the Secretary of the Treasury—all so appointed could be subjected to one and the same system, and to uniform regulations. Then, with monthly or quarterly settlements of accounts, and with all requisitions subject to the recommendation of the proper Auditor, and to the approval of the proper Comptroller, additional safeguards would be furnished against the danger of defaults by disbursing officers.

II. The [Sixth] Auditor of the Treasury for the Post-Office Department has the sole authority to settle and adjust the accounts of the Superintendent of the Post-Office building for waste paper and other old material sold by him, to certify a balance against him, and to superintend the collection of the same. (Rev. Stat., 236, 277 clause seventh, 292, 296.)

It is expressly provided by statute that:—

“All money derived from the sale of waste paper or other public property of the Post-Office Department shall be deposited in the Treas-

COMPTROLLER'S OFFICE, *June 21, 1884.*

I recommend an advance of \$1,974, viz: \$496 sals., &c., agts., &c.; \$1,478 sals. coll'rs.

Appropriation 1884.

WM. LAWRENCE,
Comptroller,
By J. TARBELL,
Depty. Comptroller.
S. C. C.”

To the Secretary of the Treasury.

“Office of the Secretary of the Treasury, division of warrants, estimates, and appropriations.

Form 49.

INTERNAL REVENUE.

[Cut.]

Accountable warrant No. —

Appropriations:
1884. Salaries and expenses
of agents and subordinate
officers of internal revenue 496
1884. Salaries and expenses
of collectors of internal
revenue 1,478

1,974

TREASURY DEPARTMENT.

To the Treasurer of the United States, greeting:

Pay to Geo. P. Dunham, Collector of Internal Revenue and Disbursing Agent for the 6th district of Ohio. Deliver draft to Commissioner of Internal Revenue, or order, to be charged to the appropriations named in the margin, one thousand nine hundred and seventy-four dollars. On account of his expenditures for the month of June, 1884, and for which he — is to be charged and held accountable, under his bond dated Aug. 6th, 1883. For so doing this shall be your warrant.

Given under my hand and the seal of the Treasury Department this 23d day of June, in the year of our Lord one thousand eight hundred and eighty-four, and of Independence the one hundred and eighth.

FRENCH,
Act'g Secretary.

Countersigned: 24th.
S. W. S.

J. TARBELL,
Acting First Comptroller.

Registered: 24th.

WM. P. TITCOMB,
Asst. Register.

25. OFFICE OF THE TREASURER OF THE UNITED STATES
Received for this warrant the following draft:
No. 76610 on Third N. B., Dayton, O.
No. — on —.
Mailed —.”

ury, under the direction of the Postmaster-General, as *part of the postal revenue*" (Rev. Stat., 4050).

In this case, the property sold was clearly within this provision—"property of the Post-Office Department." There is no statute in direct terms authorizing the sale, but the authority of the Postmaster-General to make the sale is recognized, and so is, in effect, granted by statute (Rev. Stat., 4050, 1241, 3618, 3672, 3692; *Proceeds of Sales case*, 3 Lawrence, Compt. Dec., 36). The Postmaster-General had power to devolve the duty of making sales on the Superintendent of the Post-Office building (*Agency-Delegation case*, 3 Lawrence, Compt. Dec., 63). The duty could be so devolved by written regulation, by verbal order, or by usage known and sanctioned, as in this case. The question, whether the sureties on the bond of the Superintendent are liable, is not now involved. The duties of the Superintendent are not defined by law (Rev. Stat., 393). They may, in part, be inferred from his official title. The condition in his bond is quite comprehensive. It recognizes the authority of the Postmaster-General to impose future duties on the Superintendent by any regulation. A voluntary bond, not prohibited by statute, nor against public policy, is valid (*United States v. Hodson*, 10 Wall., 406). A regulation is a rule. It may be written, and no reason is perceived why it may not exist in parol or by usage. At all events, the duties of the Superintendent will include those which proper usage has assigned to him. But, for present purposes, the authority of the Superintendent to sell is immaterial. Having sold property of the Post-Office Department, the proceeds of which belong to "the postal revenue," he is liable to account for it. The question now is, how shall he be charged with it? On general principles of law, he is liable therefor in an action, even without any account stated by an Auditor, or balance certified by a Comptroller. The United States has, as a general rule, the same right to maintain an action on an express or implied assumpsit as any private citizen (Rev. Stat., 296; *Dugan et al. v. United States*, 3 Wheat., 172, 181; *United States v. Hodson*, 10 Wall., 395). Such action can be supported upon original evidence, as in other cases, whether an account has been kept or not. But it is very proper that an account should be stated, and that a balance should be certified in favor of the United States against the Superintendent. The statute (Rev. Stat., 236) provides that:

"All claims and demands whatever by the United States or against them, and all accounts whatever in which the United States are concerned, either as debtors or as creditors, shall be settled and adjusted in the Department of the Treasury."

Again, it is provided that the Auditor of the Treasury for the Post-Office Department shall receive, audit, and settle "all accounts arising in the Post-Office Department, or relative thereto." (Rev. Stat., 277, clause seventh.) The claim in this case is founded on an account "aris-

ing in the Post-Office Department, or relative thereto." It is made the duty of the Auditor, to "superintend the collection of all debts due the Post-Office Department," (Rev. Stat., 292). Literally, there is no debt due such *Department*. But the purpose of the statute is sufficiently plain. It applies generally to all debts *due to the United States* and arising from the business of the Post-Office Department. This is made clear by other sections of the Revised Statutes (Rev. Stat., 293-297). Such claim extends by express statute to the "delinquency of any postmaster, contractor, *or other officer*, agent, or employé of the Post-Office Department" (Rev. Stat., 296). It is made the duty of said Auditor in all such cases in which suit is brought, to "forward to the Department of Justice certified copies of all papers in his office tending to sustain the claim." (Rev. Stat., 296). It is apparent from all the provisions to which reference has been made, that it is the duty of the said Auditor to audit and state the account in question, to certify a balance thereon, and to superintend its collection.

To enable the Auditor to perform the duties so required of him, the Postmaster-General could, by regulation, require the Superintendent to make periodical reports of his sales, and of the disposition of the proceeds, in order that regular accounts might be made and kept. The spirit and purpose of sections 882 and 886 of the Revised Statutes, if not the exact words, would seem, perhaps, to make transcripts of such accounts evidence as in other cases. (*United States v. Ralston*, 4 Lawrence, Compt. Dec., 507; s. c., 17 Federal Reporter, 895, 3 Lawrence, Compt. Dec., Intro., xxix; McKnight's case, 13 Ct. Cl., 310; Malakof Bitters case, 3 Lawrence, Compt. Dec., 136, *note*; *United States v. Bell*, 111 U. S., 477). But, whether so or not, the original reports made under such regulation would be evidence against the officer making them, and the utility of such account cannot well be doubted. The Auditor can even now make an account and certify a balance. He is expressly authorized to administer oaths to witnesses for this purpose (Rev. Stat., 297). Ample means are provided for securing evidence in such case (Rev. Stat., 183, 298).

The Revised Statutes contain this provision:—

"SEC. 397. The Postmaster-General shall make out and keep, in proper books, full and complete inventories and accounts of all the property belonging to the United States in the buildings, rooms, offices, and grounds occupied by him and under his charge; and shall add thereto, from time to time, an account of such property as may be procured subsequently to the taking of the same, and also an account of the sale or disposal of any such property, and to report the same to Congress during the first week of each annual session. But this section shall not apply to the supplies of stationery and fuel."

This evidently requires an account to be kept in the Post-Office Department of all sales of property connected therewith.

It is respectfully recommended that the letter of the Postmaster-Gen-

eral, with the statement which accompanies it, be referred to the Auditor of the Treasury for the Post-Office Department.*

TREASURY DEPARTMENT,

First Comptroller's Office, July 4, 1884.

* It was so referred.

The following regulations have been prescribed by the Postmaster-General:

Order of the Postmaster-General relative to requisitions and accounts.

POST-OFFICE DEPARTMENT,

Washington, D. C., June 19, 1884.

Order No. 83.

1. REQUISITIONS.—No requisition on the Secretary of the Treasury shall be for more than one specified object of appropriation, and the amount thereof shall be written in full in the blank form on which the requisition is made. In presenting a requisition to the Postmaster-General for signature the disbursing clerk will accompany it with a statement of account as provided by the blank form on this sheet. This statement will be preserved on the files of the chief clerk for comparison with the statements accompanying subsequent requisitions.

Requisitions for salaries shall be made semi-monthly, to correspond with the periods fixed for payment, and each requisition shall be for such amount only as may be necessary to meet the semi-monthly payments. For all other objects, requisitions shall not in any case be made for a greater amount than will be needed for disbursement during one month from the date of the requisition.

2. PAYMENTS.—Salaries shall be paid in cash, and the monthly pay-rolls will be submitted to the chief clerk, who will certify before payment is made that the names and salaries thereon are correct, as shown by the official records in the Appointment Office.

Payments for all sums of \$10 and upward (except for salaries) shall be made by check on the Treasurer of the United States, and the appropriation from which the payment is made shall be stated on the check.

3. ACCOUNTS.—The accounts of the disbursing officer shall be rendered monthly as provided by section 3622 of the Revised Statutes, and they shall be submitted to the Postmaster-General, to be transmitted by him to the proper officers of the Treasury Department. The accounts shall be in duplicate, one copy of which will be retained on the files of the chief clerk.

The chief clerk will see that the accounts are promptly audited by the Treasury and that a statement showing their condition is furnished to the Postmaster-General.

4. CASH ON HAND, &c.—The cash in the hands of the disbursing clerk shall be counted, and the amount reported to his credit with the Treasurer shall be verified weekly by a committee to be designated by the Postmaster-General, to whom the results shall be certified by the committee.

5. PROCEEDS OF WASTE PAPER, ETC.—Collections will be promptly made of the proceeds from the sale of waste paper, unserviceable material, and other miscellaneous items, and deposits of such proceeds shall be made from time to time as collected.

The chief clerk to the Postmaster-General will see that these instructions are carried into effect, as contemplated by section 27 of the Postal Regulations.

W. Q. GRESHAM,
Postmaster-General.

There is no law requiring "semi-monthly payments."

As to the mode of making payments, section 3620 of the Revised Statutes, as amended by the act of February 27, 1877 (19 Stat., 249), provides as follows:

"It shall be the duty of every disbursing officer having any public money intrusted to him for disbursement, to deposit the same with the Treasurer or some one of the assistant treasurers of the United States, and to draw for the same only as it may be required for payments to be made by him in pursuance of law [and draw for the same only in favor of the persons to whom payment is made]; and all transfers from the Treasurer of the United States to a disbursing officer shall be by draft or warrant on the Treasury or an assistant treasurer of the United States. In places, however, where there is no treasurer or assistant treasurer, the Secretary of the Treasury may, when he deems it essential to the public interest, specially authorize in writing the deposit of such public money in any other public depository, or, in writing, authorize the same to be kept in other manner, and under such rules and regulations as he may deem most safe and effectual to facilitate the payments to public creditors. [See § 5488.]"

See Report of the Secretary of the Treasury, of December 2, 1878; same, of December 5, 1881; and same, of 1856-'57, page 24; Report of the First Comptroller, October 20, 1882, page 9; act of June 23, 1874, 18 Stat., 216, section 3622 of the Revised Statutes, relating to the rendition of accounts, as quoted in the foregoing case.

IN THE MATTER OF THE LIABILITY OF A BIDDER FOR MAIL-SERVICE, AFTER AN AWARD OF A CONTRACT TO A LOWER BIDDER FOR THE SAME SERVICE, WHO FAILS TO EXECUTE A CONTRACT, OR WHO, HAVING EXECUTED ONE, FAILS TO ENTER ON THE SERVICE.—MURDOCK'S APPEAL.

October 16, 1882, the Postmaster-General published an advertisement that he would receive proposals until January 6, 1883, for conveying the mails in Wisconsin from July 1, 1883, to June 30, 1887; that decisions would be announced on or before March 3, 1883, and contracts executed on or before May 19, 1883. Three bidders, R., M., and C., made separate "proposals," and executed "proposal-bonds," all in the form prescribed by the Postmaster-General, to carry the mails on route 25355, for different sums, and each "proposal" and "proposal-bond" saying, that, if accepted, the bidder will enter into contract *within the time prescribed in the advertisement*. March 3, 1883, the Postmaster-General awarded the contract to R., who executed a contract, but failed to enter on service. July 14, 1883, the Postmaster-General declared R. a failing contractor, and awarded the contract, from August 15, 1883, to June 30, 1887, to M., who failed to execute a contract. August 4, 1883, the Postmaster-General declared M. a failing bidder, and awarded the contract to C., who executed a contract and entered on the service. April 14, 1884, the [Sixth] Auditor of the Treasury for the Post-Office Department stated a "damage-account" in favor of the United States against M., for \$354.53, being the difference between his bid and the cost of the service. M. appealed from this action to the First Comptroller.

Held:

- I. On general common law principles M. did not, by *the terms* of the "advertisement," "proposal," or "proposal-bond," assume any legal duty to enter into a contract after May 19, 1883.
- II. But in connection with said advertisement, and proposal, section 3952 of the Revised Statutes imposed an obligation on M. to enter into a contract, after May 19, 1883. He is liable to the United States in damages for a failure to do so.
 1. The laws, which exist at the time and place of making a contract and where it is to be performed, enter into and form part of it as fully as if therein incorporated.
 2. If a proposal for carrying mails is *silent* as to the time when a bidder may be required to enter into a contract, section 3952 of the Revised Statutes *recognizes* and so *continues* the obligation, until some one of several bidders for the same service has executed a contract and entered on service during the contract-period, even if a contract has been awarded to one of them, who either fails to execute a contract, or, having executed a contract, fails to enter on service.
 3. This section changes the common-law rule, that, when a contract is awarded to one of several bidders the obligation of all others, *ipso facto*, ceases.
 4. This section, by requiring proposals—either in terms, or by silence on the subject—imposes an obligation on every bidder to enter into a contract, at least until within a reasonable period *after* the commencement of the contract-period of service.
- III. The Postmaster-General has no legal authority to waive the requirements of a statute of the United States, by accepting a proposal in which the bidder refuses to be obligated, except for a specific period.

1. No person is, by law, required to make any proposal, or enter into any contract. If any bidder does make a proposal, which—in express terms, or by clear implication—limits the obligation to enter into a contract to a *fixed period* anterior to the beginning of the contract-period of service, it is not a proposal which the Postmaster-General can lawfully receive. But if he does receive it, section 3952 of the Revised Statutes, while not changing the effect of the contract-terms, still—itsself being a part of the contract—does impose an obligation to enter into a contract *after* the time prescribed in the proposal.
2. Though not in legal form, such proposal is, to the extent of its terms, operative by way of *estoppel* on the bidder, who cannot be heard to allege its illegality.
- IV. Being in derogation of the common law, section 3952 of the Revised Statutes is to be strictly construed.
- V. This section was not repealed by the act of August 11, 1876 (19 Stat., 129).
- VI. If it be susceptible of a construction, a statute cannot be declared void because it is vague or ambiguous.

October 16, 1882, the Postmaster-General published an advertisement, inviting proposals, “until 3 p. m., January 6, 1883,” for carrying the mails in Wisconsin, from July 1, 1883, to June 30, 1887, and stating that decisions on *proposals* would be “announced on or before March 3, 1883,” and that “contracts” were “to be executed and filed in the Department on or before May 19, 1883.” The advertisement does not, *in terms*, state that any contract is to be required *after* “the 19th of May, 1883.” The “instructions to bidders and postmasters,” contain also “conditions to be incorporated in the contracts to the extent the Department may deem proper” and, as part of the advertisement: “warn bidders and their sureties to acquaint themselves fully with the laws of Congress relating to contracts for carrying the mails (the important provisions of which are cited herein) and also to familiarize themselves with the instructions and *forms* herein furnished before they shall assume any liabilities as such bidders or sureties and to prevent misapprehension or complaint thereafter.”

Then follow instructions, including section 3952 of the Revised Statutes, and an instruction, numbered 27, as follows:—

“27. *The contracts are to be executed and filed in the Department, by or before May 19, 1883; otherwise the accepted bidder will be considered as having failed, and the Postmaster-General may proceed to contract for the service with other parties, according to law.*”

Forms of “proposal” and “proposal-bond” are given in the instructions, and were adopted by Murdock, as shown hereafter. Under this advertisement, there were three bidders on route 25355, from Green Bay to Bondnel: Richard Ritter, at \$321; W. H. Murdock, at \$390; and J. B. Colegrove, at \$480 per annum. The bid of Murdock was as follows:

“The undersigned, W. H. Murdock, whose post-office address is Shawano, county of Shawano, State of Wisconsin, proposes to carry the mails of the United States, from July 1, 1883, to June 30, 1887, on Route No. 25355 between Green Bay and Bondnel, State of Wisconsin under the advertisement of the Postmaster-General, dated October 16, 1882, ‘With celerity, certainty, and security,’ for the sum of three hundred (\$390.00)

ninety dollars per annum ; and, if this proposal is accepted, he will enter into contract, with sureties, to be approved by the Postmaster-General, within the time prescribed in said advertisement.

"This proposal is made with full knowledge of the distance of the route, the weight of the mail to be carried, and all other particulars in reference to the route and service ; and, also, after careful examination of the forms and instructions attached to said advertisement.

"Dated December 27th, 1882.

"W. H. MURDOCK,
"Bidder."

Each bid was accompanied by a "proposal-bond" to the United States, as required by the regulations. The bond given by Murdock, with sureties, and duly approved by the postmaster at Shawano, Wisconsin, was dated December 27, 1882, with a condition thereunder as follows :

"Whereas, by an act of Congress approved June 23, 1874, entitled, 'an act making appropriations for the service of the Post-Office Department for the fiscal year ending June thirtieth, eighteen hundred and seventy-five, and for other purposes,' it is provided : 'that every proposal for carrying the mail shall be accompanied by the bond of the bidder, with sureties approved by a postmaster,' in pursuance whereof, and in compliance with the provisions of said law, this bond is made and executed, subject to all the terms, conditions, and remedies thereon, in the said act provided and prescribed, to accompany the foregoing and annexed proposal of the said W. H. Murdock, bidder :

"Now, the condition of the said obligation is such, that if the said bidder, as aforesaid, shall, within such time after his bid is accepted, as the Postmaster-General has prescribed in said advertisement, to wit, on or before the 19th day of May, 1883, enter into a contract with the United States of America, with good and sufficient sureties to be approved by the Postmaster General, to perform the service proposed in his said bid, and further shall perform said service according to his contract, then this obligation shall be void ; otherwise to be in full force and obligation in law."

March 3, 1883, the Postmaster-General awarded the contract to Ritter, who, prior to May 19, 1883, executed the requisite contract ; but, as he failed to enter upon service, an order was made as follows :

"Order of the Postmaster-General, No. 10599, dated July 14, 1883 :

"Whereas Richard Ritter, contractor on the following routes under the advertisement of October 16, 1882, has failed and refused to perform the service, he is hereby declared a failing contractor ; and whereas the persons named are the next lowest bidders under said advertisement, it is hereby ordered that the contracts for the performance of the service for the balance of the contract-term, to wit: from August 15, 1883, to June 30, 1887, be, and the same are, hereby awarded to the said persons at the rates per annum specified, the amounts of their respective bids, to wit :

* * * * *
1883. July 14. 10599. Richard Ritter, \$321, No. 25355, Wis., Green Bay to Bondnel, 28½ miles, twice a week. W. H. Murdock, at \$390.
* * * * *

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Murdock having failed to comply with this order, the Postmaster-General made a similar order, No. 11914, August 4, 1883, awarding the contract, at \$480 per annum, to J. B. Colegrove, who executed a contract, and has since performed the service.

April 14, 1884, the [Sixth] Auditor of the Treasury for the Post-Office Department made up an "actual damage-account against" Murdock as follows :

"Dr. W. H. Murdock (failing bidder), contractor, in account with the United States, Cr.

Actual damage account :

25355. To difference between his bid at \$390 per annum and the new letting at \$480 per annum, from Sept. 1, 1883, to June 30, 1887.....	\$344 83
To difference between his pay at \$97.50 per quarter, from August 15th to August 31, 1883, and amount paid for temporary service for the same period.....	9 70

354 53

Office of the Auditor of the Treasury for the Post-Office Department.

J. H. ELA,

Auditor.

April 21, 1884, Murdock appealed from this action of the Auditor to the First Comptroller.

Hon. J. M. McGrew and William Small, for Murdock, argued as follows :

"That the language of section 3952 of the Revised Statutes is so vague that it cannot be interpreted to give it legal effect; that the 'bid' or 'proposal' being separate and distinct from the bond, the bidder does not enter into any 'obligation' the non-performance of which subjects him to any penalty; that the sureties on the bond are not parties to the 'bid or proposal'; that the latter portion of said section, if not entirely meaningless, implies that the several bidders are held indefinitely or during the contract term and this, we understand, is what the Auditor of the Treasury holds, and it certainly does follow that if the bidders are held at all after the time prescribed by the Postmaster-General for making the award, under this statute they can be held indefinitely or for the entire contract term, but we submit that this would be such an unreasonable interpretation that no legal effect could be given it; that the statute expressly declares 'no bidder * * * shall be released from his obligation under his bid or proposal, notwithstanding an award made to a lower bidder, until a contract for the designated service shall have been duly executed by such lower bidder and his sureties, * * * which, in its application to this case, means that all the bidders are held until Ritter, who was the 'lower bidder' and to whom the award was first made, executes a contract, &c. Ritter has not yet executed a contract, '*verba nihil operari melius est quam absurde*;' that said section was repealed by Sec. 3951, Rev. Stat., as amended by act of August 11, 1876 (19 Stat., 129) and was, consequently, not in operation at the time our client filed his proposal, as the latter section, 3951, leaves it to the discretion of the Postmaster-General whether he shall enter into a contract or not with the next lowest bidder, and clearly implies that it is optional with the next lowest bidder whether he will enter into a contract for the performance of the service or not; that, if

Sec. 3951 applies to our client's case, then we respectfully submit another and, as we think, *conclusive reason* for contending that Sec. 3952 does not apply, namely, *the want of mutuality, the contract not being binding on both parties at the same time*. Also, that if Sec. 3952 is valid and operative, the question of *reasonable time* enters into and plays an important part in our client's case, and we contend that this *reasonable time* should be confined within the time prescribed by the Postmaster-General in the official advertisement for the awarding of the contract, namely, May 19, 1883, or, at the farthest, the time prescribed by the Postmaster-General in the official advertisement for the commencement of the service, namely, July 1, 1883.

Attention is, also, called to the fact that the 'proposal bond' expressly states that it is made and executed in compliance with the provisions of the act of Congress, approved June 23, 1874, and that said act does not include Sec. 3952 aforesaid. This omission clearly indicates that the Postmaster-General does not regard the latter section as now in operation."

DECISION BY WILLIAM LAWRENCE, *First Comptroller*.

Section 3951 of the Revised Statutes, as amended by the act of August 11, 1876 (19 Stat. 129), provides that:

"After any regular bidder whose bid has been accepted shall fail to enter into contract for the transportation of the mails according to his proposals, or having entered into contract, shall fail to commence the performance of the service stipulated in his or their contract as therein provided, the Postmaster-General shall proceed to contract with the next lowest bidder or bidders in the order of their bids, for the same service, who will enter into a contract for the performance thereof, unless the Postmaster-General shall consider such bid or bids too high, and in case each of said bids shall be considered too high, then the Postmaster-General shall be authorized to enter into contract, at a price less than that named in said bids, with any person, whether a bidder or not, who will enter into contract to perform the service in accordance with the terms and provisions prescribed for the execution of other contracts for similar service; and in case no satisfactory contract can be thus obtained, he shall re-advertise such route. And if any bidder whose bid has been accepted, and who has entered into a contract to perform the service according to his proposal, and in pursuance of his contract has entered upon the performance of the service, to the satisfaction of the Postmaster-General, shall subsequently fail or refuse to perform the service according to his contract, the Postmaster-General shall proceed to contract with the next lowest bidder for such service, under the advertisement thereof, (unless the Postmaster-General shall consider such bid too high) who will enter into contract and give bond, with sureties, to be approved by the Postmaster-General, for the faithful performance thereof, in the same penalty and with the same terms and conditions thereto annexed as were stated and contained in the bond which accompanied his bid; and in case said next lowest bidder shall decline to enter into contract for the performance of such service, then the Postmaster-General may award the service to, and enter into contract with, any person, whether a bidder on said route or not, who will enter into contract to perform the service and execute a bond of like tenor and effect as that required of bidders, in a penalty to be prescribed, and with sureties to be approved by the Postmaster-

General, for the performance of the service contracted to be performed at a price not exceeding that named in the bid of the said next lowest bidder; and if no contract can be secured at the price named in said next lowest bid, then the Postmaster-General shall proceed to secure a contract, at a price not considered too high, with any person who will execute such contract in accordance with the law applicable thereto, giving in all cases, the preference to the regular bidders on the list whose bids do not exceed the price at which others will contract therefor; and if no satisfactory contract can be thus secured, the route shall be re-advertised. Whenever an accepted bidder shall fail to enter into contract, or a contractor on any mail-route shall fail or refuse to perform the service on said route according to his contract, or when a new route shall be established or new service required, or when, from any other cause, there shall not be a contractor legally bound or required to perform such service, the Postmaster-General may make a temporary contract for carrying the mail on such route, without advertisement, for such period as may be necessary, not in any case exceeding six months, until the service shall have commenced under a contract made according to law: *Provided however*, That the Postmaster-General shall not employ temporary service on any route at a higher price than that paid to the contractor who shall have performed the service during the last preceding contract term. 'And in all cases of regular contracts hereafter made, the contract may, in the discretion of the Postmaster-General, be continued in force beyond its express terms for a period not exceeding six months, until a new contract with the same or other contractors shall be made by the Postmaster-General.'

Section 3952 of the Revised Statutes provides that:—

"No bidder for carrying the mail shall be released from his obligation under his bid or proposal, notwithstanding an award made to a lower bidder, until a contract for the designated service shall have been duly executed by such lower bidder and his sureties, and accepted, and the service entered upon by the contractor to the satisfaction of the Postmaster-General."

Section 3945 of the Revised Statutes, as amended by section 12 of the act of June 23, 1874 (18 Stat., 235), provides that:—

"Every proposal for carrying the mail shall be accompanied by the bond of the bidder, with sureties approved by a postmaster, and in cases where the amount of the bond exceeds five thousand dollars, by a postmaster of the first, second, or third class, in a sum to be designated by the Postmaster-General in the advertisement of each route; to which bond a condition shall be annexed, that if the said bidder shall, within such time after his bid is accepted as the Postmaster-General shall prescribe, enter into a contract with the United States of America with good and sufficient sureties, to be approved by the Postmaster-General, to perform the service proposed in his said bid, and, further, that he shall perform the said service according to his contract, then the said obligation to be void, otherwise to be in full force and obligation in law; and in case of failure of any bidder to enter into such contract to perform the service, or, having executed a contract, in case of failure to perform the service, according to his contract, he and his sureties shall be liable for the amount of said bond as liquidated damages, to be recovered in an action of debt on the said bond. No proposal shall be considered unless it shall be accompanied by such bond, and there shall have been affixed to said proposal the oath of the bid-

der, taken before an officer qualified to administer oaths, that he has the ability, pecuniarily, to fulfill his obligations, and that the bid is made in good faith, and with the intention to enter into contract and perform the service in case his bid is accepted."

See sections 243, 244, 245 of the act of June 8, 1872 (17 Stat., 313).

It may be proper to state that the question presented by the appeal in this case is *not* (1) what may be the liability of Murdock or his sureties on his "proposal-bond" of December 27, 1882, but (2) *it is*, whether the "actual damage account" were legally made.

I.—The condition of the "proposal-bond" simply requires the bidder, after his bid is accepted, to enter into a contract "*on or before the 19th of May, 1883,*" and "with good and sufficient sureties, to be approved by the Postmaster-General, to perform the service proposed in his said bid and further shall perform said service according to his contract."

The "proposal-bond" is authorized by section 3945 of the Revised Statutes, as amended by the act of June 23, 1874 (18 Stat., 235). Whether the condition of the "proposal-bond" could, under this section, be made *in terms* to require the execution of a contract by a bidder in the condition of Murdock, is not now material. The form prescribed by the Post-Office Department does not, in terms, make it so. Neither the "advertisement" nor the "*proposal*" or bid, nor the "*proposal-bond,*" *in terms* requires Murdock to enter into the contract required of him by the order of the Postmaster-General, of July 14, 1883. If Murdock is, in law, bound to enter into such contract, it is only by force of section 3952 of the Revised Statutes. The liability of Murdock and his sureties, *if any*, on the "proposal-bond" and apparently against its terms, and the terms of the advertisement and proposal, is one for the courts and not for the Comptroller.

But the question is, at least to some extent, *in principle* involved in the one which the Comptroller *is* required to decide.

II.—If Murdock has violated, or failed to comply with any contract he made with the United States, or obligation he assumed thereto by proposal *or otherwise*, and if the United States has been damaged thereby, it is the duty of the [Sixth] Auditor of the Treasury for the Post-Office Department to state a "damage account" against him (Rev. Stat., 236, 277, clause seventh), and to direct suit to be brought to recover the amount thereof. (Rev. Stat., 292, 295, 296; *Burnside's case*, ante 302.)

It is clear that, if Murdock were in law required to enter into contract in pursuance of the order of July 14, 1883, damage has resulted to the United States.

The real question to be decided, therefore, is:—Was Murdock legally required to enter into such contract? The Postmaster-General is authorized by express statute "to decide on the forms of all official papers" (Rev. Stat., 396, clause third), and "to prescribe regulations not inconsistent with law for the government of his Department, the conduct of its officers and clerks, the distribution and performance of

its business, and the custody, use, and preservation of the records, papers, and property appertaining to it" (Rev. Stat., 161). He is authorized "to superintend generally the business of the Department, and execute all laws relative to the postal service" (Rev. Stat., 396, clause ninth).

It thus seems clear that bidders for carrying the mails *may be required* in their "proposals," in *express terms*, to offer to enter into contract, not merely, as in this case, "*within the time prescribed in said advertisement*," but "whenever required by the Postmaster-General" during a prescribed period, including *any time within the four years of the proposed service* unless some bidder has previously entered on service. The "advertisement," "proposal," and "proposal-bond" can all be made to conform to this mode, and, thus in express terms, impose an obligation on the sureties on the "proposal-bond," and secure liabilities relieved of doubts which may now fairly exist. The amended section 3945 of the Revised Statutes, in clear terms, requires bidders to furnish a "proposal-bond" with sureties, and with a condition to enter into a contract "*within such time* after his bid is accepted as the Postmaster-General shall prescribe."

In this case the time prescribed was May 19, 1883, in the "advertisement," "proposal," and "proposal-bond." It *might* have been *any time* during the calendar year 1883, or during the whole four years of proposed mail service, if no bidder had previously entered on service. It would seem, therefore, that there is no difficulty in adopting forms which will, in future, and in cases similar to this, secure a liability to the Government.

III.—It is clear that Murdock has not, *by the terms* of the "advertisement," "proposal" or "proposal-bond" standing alone and on general common law principles, assumed any legal duty to enter into a contract as required by the order of the Postmaster-General of July 14, 1883. These are all to be read and construed together, in order to ascertain the full meaning of each. Thus, it is said that, "the contract may be contained in several instruments, which, if made at the same time, between the same parties, and in relation to the same subject, will be held to constitute but one contract, and the court will read them in such order of time and priority as will carry into effect the intention of the parties, as the same may be gathered *from all the instruments taken together*" (2 Parsons, Cont., 6th ed., 503 [649]). The proposal is: to "enter into a contract * * * within the time prescribed in said advertisement." The "proposal-bond" is conditioned to "enter into a contract" * * * "within such time after his bid is accepted as the Postmaster-General has prescribed in said advertisement, *to wit, on or before the 19th day of May, 1883.*" No *other* contract is mentioned. No language is employed from which to infer an intention to incur an obligation to enter into any other contract. The only permissible inference is that which arises on the maxim, "*expressio unius est exclusio al-*

terius" (Broom, Leg. Maxims, 7th ed., 650 [*651]), that the bidder would not enter into any contract at any other time *under or by virtue of the original accord made on the proposals*. The proposal does not, *in terms*, include the inference of an obligation after May 19, 1883, but, in clear terms, excludes it, as to such contract and on the first award. It has been said that "what is implied in a statute is as much a part of it as what is expressed." (United States v. Hodson, 10 Wall., 406; United States v. Babbit, 1 Black, 55, 61.) And the same is true of a contract or *proposal*. In this case, the right of the Government to accept Murdock's bid was, by the *express terms* of the advertisement, proposal, and proposal-bond, continuous from January 6, 1883, to May 19, 1883, and expired with the latter date. If, during *this period*, a lower bidder with an award in his favor had failed to execute a contract when required by the Postmaster-General, *then* Murdock might have been required to enter into a contract. Section 3952 of the Revised Statutes, in connection with the general powers of the Postmaster-General, authorized him by advertisement to require proposals and proposal-bonds from all bidders liable to be continuously acceptable *until any one of them having an award in his favor had entered upon the service*, but such proposals in this case were not required in this form. Hence it follows that the proposal and proposal-bond, standing alone, on general common law principles, and without the aid of section 3952 of the Revised Statutes, do not impose on Murdock any obligation to enter into a contract under the order of July 14, 1883.

IV.—Does section 3952 of the Revised Statutes, *in connection with* the "advertisement," "proposal," or "proposal-bond," impose such legal duty? It must be held that it does. This section enters into and forms a part of the advertisement, proposal, and proposal-bond, as fully as if therein incorporated. Thus, it is said, "the laws which exist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it." (Walker v. Whitehead, 16 Wall., 317; Louisiana v. Jumel, 107 U. S., 750; Keyser's case, 4 Lawrence, Compt. Dec., 294; The Homestead cases, 22 Gratt., 288.)

It cannot be doubted that this section, being in derogation of the common law—in one particular a repeal of the common law—is to be strictly construed. The repeal is not operative beyond the clear meaning of the repealing words. No repeal of the common law is to be regarded as effected by implication. (Hardcastle, Statutory Law, 89, 160; Arthur v. Bokenham, 11 Mod., 150; Minet v. Leman, 20 Beav., 278; Bishop, Written Laws, 119, 155; Sedgwick, Construction Stat. and Const. L., 2d ed., 267–275.)

The purpose of section 3952 of the Revised Statutes is sufficiently apparent. It was intended to change a common law rule. When the Government, by its agent the Postmaster-General, by advertisement invites proposals to render a specified service, with authority in that officer to award a contract to the lowest or any acceptable bidder, the

moment any bid is accepted, and the award made, a contract is complete, and on general *common law* principles all the unsuccessful bidders are *released from all obligations* under their bids. Thus, it has been held that: "where a party furnishes sureties and binds himself for the performance of his bid if accepted, the contract becomes mutual and binding from the moment of its acceptance, although a formal written contract is to be subsequently executed." (Adams's case, 1 Court Cl., 192; 1 Parsons, Cont., 6th ed., Book 2, section 2, page 430; Moore & Boice's case, 1 Court Cl., 90; Bank of Columbia v. Hagner, 1 Peters, 445; Garfield v. United States, 93 U. S., 242; Whiteside v. United States, Id., 247.)

At auction sales, a bidder is released from his bid when the auctioneer knocks the property down to another and higher bidder, although the latter may subsequently fail to complete his purchase by payment. (1 Parsons, Cont., 6th ed., 479, 480 497,; Benjamin, Sales, 4th Amer. ed., sec. 42.)

The object of section 3952 of the Revised Statutes was to change the common law rule, by which a bidder for mail service was released from his bid when a contract was awarded to a lower bidder, and to require the obligation of the bidder to enter into a contract, to continue until a contract had been executed and service entered upon by some bidder. One purpose was, to enable the Postmaster-General to require each bidder to hold himself in readiness to execute a contract and enter upon service, in case all other bidders failed to do so. Thus, the liability to execute a contract and enter on service would continue up to and for a reasonable period after service was required to commence. If, therefore, a proposal for carrying mails is *silent* as to the time when the bidder shall enter into a contract, section 3952 of the Revised Statutes fixes the time. Undoubtedly this section contemplates advertisements, proposals, and proposal-bonds in conformity with its objects. It is a general rule that when a statute *recognizes* a power or duty, it *gives* such power or imposes such duty. (Bliss's case, *ante*, 38.) On the same principle, section 3952, by *recognizing* proposals with a liability continuing until service is entered upon, *requires* them, by being silent as to the time of executing a contract, either *in terms*, or in legal effect, in this form. It is, thus, a statutory duty of the Postmaster-General to prescribe forms in accordance with the objects of the statute. And it is clear that he cannot waive what the statute requires. (Hunter v. United States, 5 Peters, 187; Receiver's case, 1 Lawrence, Compt. Dec., 2d ed., 362; s. c., 2 Id., 2d ed., 127; Sanborn's case, 3 Lawrence, Compt. Dec., 210; Indorsement case, 4 Lawrence, Compt. Dec., 458; Schell's case, Id., 477; Hardcastle, Statutory Law, 49, 54.) He is not authorized to dispense with a requirement of a statute. But no citizen is required to accept the terms of the statute. A bidder may refuse to make a bid in conformity to the law. He may in his bid expressly say to the Postmaster-General, "I will agree to execute a contract, if required, by

May 19, 1883, but I will not do so at a later date." This would not be a bid in the form required by law. The Postmaster-General is not lawfully authorized to receive such bid. But if he do so, and accept it, and award a contract *within the time proposed therein*, the bidder cannot refuse to execute a contract according to his proposal. He is *estopped* from saying his proposal is unauthorized or illegal. Having by his proposal asked the Postmaster-General to accept a bid not in legal form, he cannot in law be permitted to assert that his proposal is not legal in form. (Grant and Davis case, *ante*, 117.)

Murdock is entitled to the full benefit of the inference that, when he proposed to enter into a contract, "on or before May 19, 1883," he could not be required to enter into *the contract*, contemplated by the bid, at a later date. But what was *the contract*, which the proposal in this case specified as to be executed on May 19, 1883? The statute authorizes the Postmaster-General to make contracts at more than one time for any given service for a prescribed period. He may make a contract at such time as he may prescribe *on his first award to the lowest or the selected one of two or more competing bidders* on their original proposals, and in advance of the commencement of service. So, if the party so selected either fail to enter into a contract, or having executed one, fail to enter on service, the Postmaster-General may then, or within a reasonable time, require any other of such competing bidders to execute a contract and enter on service. *The contract*, which the "proposals" in this case *specifically designate* to be executed on May 19, 1883, is that awarded in the first instance to the selected one of the competing bidders. Each proposal says that the bidder will execute *that contract*, or the contract so required, on or before that date. But the advertisement and the statute expressly gave notice to all bidders, and entered into and formed a part of each bid, that, if the bidder first selected by an award failed to execute a contract, or, having executed one, failed to enter on service, no bidder should be released from his obligation under his bid to still execute a contract and enter on service. This is the fair reasonable meaning of the statute, the advertisement, and the proposals, all taken and considered together. This construction makes the proposals legal in form, and relieves bidders and Government-officers alike from the imputation of doing anything contrary to law.

It may be proper to add that some of the positions taken by counsel in this case are untenable. Section 3952 of the Revised Statutes is not so vague as to be void. Its purpose is entirely clear. But if not so, if susceptible of construction, it must be construed, and cannot be declared void. (1 Blackstone, Com., 91; Hardcastle, Statutory Law, 19.) This section was not repealed by act of August 11, 1876 (19 Stat. 129), amending section 3951 of the Revised Statutes. There is no express repeal. Both can stand and be operative. The original sections 3951 and 3952 are no more in conflict than these sections as now in force.

The former section gives the Postmaster-General authority, after a bidder has failed to enter into a contract, or to enter upon service, to award a contract to a bidder who is willing to accept, even when he is not legally bound to do so.

The great importance to the postal service of the questions involved in this case is fully appreciated, but this cannot require imperative rules of law to be disregarded.

The action of the [Sixth] Auditor of the Treasury for the Post Office Department in stating an account against Murdock is affirmed.*

TREASURY DEPARTMENT,

First Comptroller's Office, July 21, 1884.

* The following form was formerly in use :

PROPOSALS.

The undersigned , whose post office address is , County of , State of , proposes to convey the mails of the United States, from July 1, 1867, to June 30, 1871, on route No. between and under the advertisement of the Postmaster General, dated October 31, 1866, "with celerity, certainty, and security," for the annual sum of dollars.

This proposal is made with full knowledge of the distance of the route, the weight of the mails to be carried, and all other particulars in reference to the route and service; and also after careful examination of the laws and instructions attached to the advertisement.

Dated .

GUARANTY.

The undersigned, residing at , State of , undertake that, if the foregoing bid for carrying the mail on Route No. be accepted by the Postmaster General, the bidder shall, prior to the 1st day of July, 1867, enter into the required obligation, or contract, to perform the service proposed, with good and sufficient sureties.

This we do understanding distinctly the obligations and liabilities assumed by guarantors under the 27th section of the act of Congress of July 2, 1836.

Dated * * * .

IN THE MATTER OF THE RIGHT OF CLERKS OF THE CIRCUIT AND DISTRICT COURTS OF THE UNITED STATES, WHEN ATTENDING TERMS OF COURT AWAY FROM THEIR RESIDENCES, TO *PER DIEM* FEES FOR SUNDAYS ON WHICH SUCH COURTS ARE NOT ACTUALLY IN SESSION.—SUNDAY *PER DIEM* CASE.

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1. Construction given to sections 823, 824, and 828 of the Revised Statutes.
 2. *Per diem* case (1 Lawrence, Compt. Dec., 2d ed., 256) re-affirmed.
 3. A claim based on a fraud upon a statute will be rejected.
 4. A District Attorney, for attendance during a term of Court away from his residence, is entitled to *per diem* fees for Sundays included in such term.
 5. In such case a District Attorney is also entitled to *per diem* compensation for short adjournments during a term.
 6. Under section 828 of the Revised Statutes a Clerk of a Circuit or District Court of the United States, in attendance on such Court away from his residence, is entitled to *per diem* compensation only "for his attendance on the court while actually in session," and, hence, is not entitled to a *per diem* fee for a Sunday during the term, when no Court is "actually in session."
 7. Nor is he, in such case, entitled to a *per diem* fee during a recess of Court.

8. A change in construing an ambiguous statute should generally be made prospective in its operation, when it affects an officer, who, on the faith of a long continued usage, has paid out money previously allowed under it, or has rendered services, for which compensation has under such usage been previously paid, and which he might lawfully have omitted to perform.
9. But, when an officer is required to render a service, which he cannot lawfully omit, an erroneous usage to pay for such service should be reversed, and the change should be applied, as well retroactively as prospectively.

The question is presented to the First Comptroller for his decision thereon (Rev. Stat., 269, 277), whether a Clerk of a Circuit or District Court of the United States, who attends a term of Court away from his residence, is entitled to a *per diem* fee of five dollars for each Sunday, on which Court is not actually in session, during such term.

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DECISION BY WILLIAM LAWRENCE, *First Comptroller*.

The statute prescribing the fees of Clerks of the Circuit and District Courts of the United States provides that:—

“The following and no other compensation shall be taxed and allowed to * * * clerks of the Circuit and District Courts.

* * * * *

For traveling from the office of the clerk, where he is required to reside, to the place of holding any court required by law to be held, five cents a mile for going and five cents for returning, and five dollars a day for his attendance on the court while *actually* in session.” (Rev. Stat., 823, 828.)

The corresponding fees of each District Attorney are provided for, as follows:

“For each day of his necessary attendance in a court of the United States on business of the United States, when the court is held at the place of his abode, five dollars; and for his attendance when the court is held elsewhere, five dollars for each day of the term.”

“For traveling from the place of his abode to the place of holding any court of the United States in his district, or to the place of any examination before a judge or commissioner, of a person charged with crime, ten cents a mile for going and ten cents a mile for returning.” (Rev. Stat., 824.)

It will be observed that this gives a District Attorney a right to the *per diem* “for his attendance” “for each day of the term,” “when the court is held elsewhere” than “at the place of his abode.” If a *Sunday*, on which there is no actual session of the Court, during a term “held elsewhere” than “at the place of his abode,” is a *day of such term*, then the District Attorney is entitled to a *per diem* therefor. Bouvier, in his Law Dictionary, defines a term, “in practice,” as follows:

“The space of time during which a court holds a session. * * * The whole term [for *some* purposes] is considered as but one day; so that the judges may at any time during the term revise their judgments. In the computations of the *term*, all adjournments are to be included.”

See *Dewitt v. Greenfield* (5 Ohio, 225), *May v. the State of Ohio* (14 *Id.*, 465), *Paine, Kendall & Co. et al. v. Mason et al.* (7 Ohio, St., 206).

Sunday, as a general rule, "is not a day for judicial business, it is excluded from computations relating thereto, when consistent with the words" (Bishop, *Written Laws*, 110c). And it is said, that Sunday is not "counted among the days of a term of court. But the rule governing most classes of cases is, that it is counted the same as any other day" (*Id.*, citing *Chicago v. Vulcan Iron Works*, 93 Ill., 222; *The State v. Howard*, 82 N. C., 623; *National Bank v. Williams*, 46 Mo., 17; *Ridgley v. The State*, 7 Wis., 661; *Michie v. Michie*, 17 Gratt., 109; *Read v. Commonwealth*, 22 *Id.*, 924). But see *Peacock v. Reg.*, 4 C. B., N. S., 264. And see *Burton v. Chicago*, 53 Ill., 87; *Clerks' Sav. Bank v. Thomas*, 2 Mo., App., 397.

In *Leib v. The Commonwealth* (9 Watts, Pa., 200) it was held, that, "a day to which a court was adjourned is part of the same term at which the adjournment was made." The usage as to District Attorneys so long settled that it is to be regarded as law, is that, a District Attorney, for attendance during a term of court away from his residence, is entitled to *per diem* fees for Sundays included in such term (*Per Diem* case, 1 Lawrence, *Compt. Dec.*, 2d ed., 256).

Every statute is to receive a reasonable construction (Bishop, *Written Laws*, 93, 212), and every officer is bound to act in good faith. If, therefore, a Court adjourns over for such period of time as will reasonably afford an opportunity to a District Attorney to return home, so that the cost to the United States will be less than for him to remain, it is his duty to do so, and his accounts will be settled accordingly. The purpose of the statute is, to pay every District Attorney for such time as he is reasonably required to be away from his home during a term of Court. Courts and accounting officers cannot always prevent *evasions* of a statute, but such officers will refuse to allow claims founded on "a *positive fraud*" upon a statute (*Hardcastle, Statutory Law*, 23-25, citing *Ramsden v. Lupton*, L. R., 9 Q. B., 32; *Fox v. Bishop of Chester*, 2 B. & C., 655; s. c., 1 Dow & C., 429; *Wright v. Davies*, L. R., 1 C. P. D. 646; *Alexander v. Brane*, 7 De G. M. & G., 539).

To a certain extent the *usage* has been, under circumstances similar to the above, to allow *per diem* fees to Clerks for Sundays. But, "as against a plain statutory law, no usage is of any avail" (Broom, *Leg. Max.*, 7th ed., 684); and it is evident that the statute was not designed to place Clerks on the same footing with District Attorneys. It gives a District Attorney mileage at ten cents a mile, but a Clerk only five. It gives a District Attorney a *per diem* fee "for each day of his necessary attendance * * * when the court is held at the place of his abode * * * ; and * * * for each day of the term," "when the court is held elsewhere"; while it gives a Clerk the same fee only "for his attendance on the court *while actually in session*." It must be pre-

sumed that the difference in the phraseology employed as to these two officers had some purpose. Thus, it has been said, that:—

“Where two statutes, dealing with the same subject-matter, use different language, it is an acknowledged rule of construction that one may be looked at as a guide to the construction of the other” (Hardcastle, Statutory Law, 64, citing *Dickenson v. Fletcher*, L. R., 9 C. P., 8). See Bishop, Written Laws, 98, and Sedgwick, Construction Stat. and Const. L., 2d ed., 212, *n.*, citing *Rich v. Keyser*, 54 Pa., St., 86; *Burwell v. Tullis*, 12 Minn., 572. See also *Birch's case*, 1 Lawrence, Compt. Dec., 2d ed., 155.

The rule stated applies even more forcibly when *one statute*, dealing with two similar subjects, uses different language. It is clear, that, under the plain language of the statute, a Clerk is only entitled to the *per diem* fees in question “for his attendance on the court *while actually in session*”; and that, when there is no session on Sunday or during a recess of the court, there can be no “attendance on the court *while actually in session*,” and no payment of a *per diem fee*. If such Sunday is even a “day of the term” for the District Attorney, the statute does not make it so for the Clerk.

In some cases a *change* in construing an ambiguous statute should be made *prospective* in its operation, as where an officer on the faith of a *long continued usage* has paid his deputies for services, for which compensation had been previously allowed under such usage; or where an officer has rendered services, which he would not have performed but for a long continued usage to make payment therefor (*Ralston's case*, 4 Lawrence, Compt. Dec., 510). But, where, as in this case, it is a simple question of law whether an officer is entitled to a fee, for a service which he could not by any possibility have omitted, or rather for time unavoidably consumed without service, there is no hardship in applying the law as it is, and there is no discretion allowed to accounting officers to omit to do so.

The *per diem* fees in question will not be allowed.

TREASURY DEPARTMENT,

First Comptroller's Office, July 17, 1884.

Compensation of Marshals—Marshal's Sunday Per-Diem Case. 329

IN THE MATTER OF THE RIGHT OF A MARSHAL OF THE UNITED STATES TO A *PER-DIEM* COMPENSATION FOR SUNDAYS DURING A TERM OF THE UNITED STATES CIRCUIT OR DISTRICT COURT ON WHICH HE IS IN ATTENDANCE.—MARSHAL'S SUNDAY *PER-DIEM* CASE.

1. A Marshal of the United States in attendance on a term of the United States Circuit or District Court is, under section 829 of the Revised Statutes, entitled to a *per-diem* compensation of five dollars for Sundays during such term.

The Marshal of the Northern District of Texas resides at Dallas. The question is presented to the First Comptroller to decide, whether said Marshal is entitled to *per-diem* fees of five dollars each for Sundays during terms of the United States Circuit and District courts held at Waco and Graham, which he attended.

DECISION BY WILLIAM LAWRENCE, *First Comptroller*.

The Revised Statutes contain the following provisions :

"The following and no other compensation shall be taxed and allowed to attorneys, solicitors, and proctors in the courts of the United States, to district attorneys, clerks of the circuit and district courts, marshals, commissioners, witnesses, jurors, and printers in the several States and Territories, except in cases otherwise expressly provided by law. * * *

FEEES OF ATTORNEYS, SOLICITORS, AND PROCTORS.

For each day of his necessary attendance in a court of the United States on the business of the United States, when the court is held at the place of his abode, five dollars; and for his attendance when the court is held elsewhere, five dollars for each day of the term.

For traveling from the place of his abode to the place of holding any court of the United States in his district, or to the place of any examination before a judge or commissioner, of a person charged with crime, ten cents a mile for going and ten cents a mile for returning.

CLERKS' FEES.

For traveling from the office of the clerk, where he is required to reside, to the place of holding any court required by law to be held, five cents a mile for going and five cents for returning, and five dollars a day for his attendance on the court while actually in session.

MARSHALS' FEES.

For attending the circuit and district courts, when both are in session, or either of them when only one is in session, and for bringing in

and committing prisoners and witnesses during the term, five dollars a day.

(Rev. Stat., 823-829).

The statute provides, in effect, as to every marshal, that, for attending the Circuit and District Courts, &c., he shall be allowed, "during the term, five dollars a day." As to each Clerk, the provision is, that he shall be allowed "five dollars a day for his attendance on the court *while actually in session*." It is to be presumed that Congress had some purpose in employing a different form of expression to describe the time for which a Clerk should receive *per-diem* compensation, and that for which a marshal should be paid the same compensation. A Clerk is expressly limited to the time "while [the court is] *actually in session*"; but a marshal is allowed, "during the term, five dollars a day." The latter words are comprehensive enough to include Sundays, although the Court is not in session; but, whether so or not, the usage, to allow a marshal *per-diem* fees for such days, has been so long continued that it may be regarded as settled executive common law. This usage is, at all events, not clearly against the statute, and, so, will not now be disturbed. Sunday is, at common law, and as a general rule, *dies non*. But, when a statute gives an officer *per-diem* compensation for a period of time clearly including Sundays, effect must be given to such statute. It is clearly competent for Congress so to provide, being solely a question of expediency which the law-making power can determine.

Compensation will be allowed accordingly.

TREASURY DEPARTMENT,

First Comptroller's Office, July 17, 1884.

IN THE MATTER OF THE COMPENSATION OF INTERNAL-REVENUE AGENTS
FOR A DAY ON WHICH AN ACT OF CONGRESS, TERMINATING THEIR
AUTHORITY, WAS APPROVED BY THE PRESIDENT—REPEAL-EMPLOY-
MENT CASE.

1. It is a general rule, that, when no time is prescribed by law for an act of Congress to take effect, it is operative from the first moment of the day on which it is approved by the President.
2. But, when an agent of the United States, entitled to compensation from the Government, rendered services therefor during business-hours on July 7, 1884, and at one o'clock, p. m., of the same day the President approved an act terminating the authority of such agent, he is entitled to compensation for that day.
3. The agent in such case was lawfully in service until one o'clock, p. m., of said day, and, so, acquired a legal right to compensation. This right is *property*, which is protected by the Constitution, and cannot be divested by an act of Congress. A right to property can only be divested by "due process of law."

Under section 3152 of the Revised Statutes, as amended by the acts of June 19, 1878 (20 Stat., 187), and March 1, 1879 (*Id.*, 329), thirty-five

internal-revenue agents, duly appointed, were employed by the Commissioner of Internal Revenue, rendered services, and were paid as such agents during the fiscal year which ended June 30, 1884, and up to July 5, 1884, when the number of such agents was reduced to twenty-five by the Commissioner, in anticipation of a change in the law to that extent. These twenty-five continued in service, until the number was further reduced to twenty by the legislative, executive, and judicial appropriation act of July 7, 1884 (23 Stat., 172), which makes an appropriation, with a proviso thereto, as follows:—

“For salaries and expenses of agents and surveyors, for fees and expenses of gaugers, for salaries of storekeepers, and for miscellaneous expenses two million three hundred thousand dollars.

“*And provided*, That storekeepers, or storekeepers and gaugers who are assigned to distilleries whose registered capacity is twenty bushels or less shall receive two dollars per day for their services; and no collector in any district shall recommend, nor shall there be appointed or commissioned, more deputy collectors, storekeepers, storekeepers and gaugers, gaugers, inspectors, or other officers, or allowed to remain in commission more of any of said officers, at any one time, than fifteen per centum in excess of the number actually engaged in performing duty at the time, and indispensably necessary for the performance of said duty. And hereafter there shall not be employed exceeding *twenty agents*, in lieu of the number now authorized by law.”

The President signed his approval of this act at about one o'clock, p. m., July 7, 1884.

July 17, 1884, the Commissioner of Internal Revenue, by letter to the First Comptroller, said that, on the 7th of July, 1884, five of the twenty-five internal-revenue agents then employed were discharged, and were so informed by telegraph, but that the notice of discharge did not reach them until after the close of business hours, and that each one of the five actually rendered services on the latter day. The Commissioner inquires whether they are entitled to a *per-diem* compensation for that day.

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OPINION BY WILLIAM LAWRENCE, *First Comptroller*.

The general rule is well settled, that, when no time is prescribed by law for an act of Congress to take effect, it is operative from the first moment of the day on which it is approved by the President (Statute-Time case, 4 Lawrence, Compt. Dec., 399; 1 Wendell's Blackst., Comm., 47, note; 1 Kent, Comm., 454; Potter's Dwarrris, Stat., 169; Sedgwick, Construction Stat. and Const. L., 2d ed., 65). To this rule there are exceptions, as “when a *constitutional* or other like right would thereby be impaired, the actual hour and minute of its [the act's] receiving the executive approval may be inquired into, and it will date from the instant thus ascertained” (Bishop, Written Laws, 27). A party cannot be convicted of a crime committed before, but on the day of the approval of the act making the deed criminal; because the Constitution declares that “no * * * *ex post facto* law shall be passed” (Const.

of the U. S., Art. I, sec. 9, par. 3; Bishop, Written Laws, 29). So, it is said that, the actual time of the approval of an act may be shown "where justice requires" (Bishop, Written Laws, 29, citing *Chick v. Smith*, 8 Dowl., P. C., 337; *Campbell v. Strangeways*, 3 C. P. D., 105; *Lockett v. Hill*, 1 Woods, 552; *Combe v. Pitt*, 3 Burr., 1423, 1434; *Johnson v. Pennington*, 3 Green, N. J., 188; *Salmon v. Burgess*, 1 Hughes, 356; *In re Wynne*, Chase, Dec., 227, 251; *In re Richardson*, 2 Story, 571; 3 Op. Att.-Gen., 82; *People v. Clark*, 1 Cal., 406; *United States v. Arnold*, 1 Gall., 348; *Lang v. Phillips*, 27 Ala., 311; *Kimm v. Osgood*, 19 Mo., 60; *Gardner v. The Collector*, 6 Wall., 499). Any legal evidence may be received to ascertain the precise time when an act was approved (Bishop, Written Laws, 29, citing *Gardner v. The Collector*, 6 Wall., 499; *Kennedy v. Palmer*, 6 Gray, 316; *Turly v. Logan*, 17 Ill., 151; *Prescott v. Illinois & Michigan Canal*, 19 *Id.*, 324; *McCulloch v. The State*, 11 Ind., 424; *Southwark Bank v. Commonwealth*, 26 Pa. St., 446). "Every person * * * is affected by an Act of * * * [Congress] the moment it comes into operation, even although it may be morally certain that he could not know that the statute in question had been passed" (*Hardeastle*, Statutory Law, 194, citing *McNaughton's case*, 10 Cl. & Fin., 210; *Bailey's case*, Russ. & R., 4).

The five internal-revenue agents above mentioned lawfully entered on service on the morning of July 7, 1884. Until one o'clock, p. m. of that day there was no law actually in force which terminated their legal right to continue in service. On the faith of existing law they rendered services for a compensation prescribed by statute. The right to compensation thus earned was, and is, *property*. Their right to compensation for said day does not alone depend on the justice of their claims, or on the hardship or wrong of refusing to make payments. Being property, such right is protected by that clause of the Constitution which declares that "no person shall be * * * deprived of * * * *property* without due process of law" (Const. U. S., Amendments, Art. V). Until one o'clock, p. m. of July 7, 1884, the claimants had a right to compensation for services rendered on that day. This was, and is, property, and their right to it has not been divested by "due process of law," and cannot be divested by act of Congress.

For many purposes an act of Congress takes effect from the first moment of the day on which it is approved. This results from the *fiction* that a day is an entirety, and from the general rule resulting therefrom, that the law recognizes no fractions of a day. But a *fiction* cannot defeat the protection which the Constitution has given to property. If, in pursuance of a statute, an officer of the Government lawfully paid out for the benefit of the United States \$1,000 at noon of July 7, 1884, with a right by law to re-imbursement therefor, and at one o'clock, p. m., of the same day, an act was approved, repealing the statute, which gave authority to make such payment, and which also gave the right to re-imbursement, would such officer thereby lose his right to re-im-

bursement from the United States? Clearly not. His right to such reimbursement is *property*. It is sacred under the Constitution. A statute cannot divest this right. Even without Article V of the Amendments to the Constitution, there are certain recognized constitutional limitations on the legislative power of Congress. Legislative power does not exist to the extent of annihilating vested rights of property. The internal-revenue agents, having lawfully served until one o'clock, p. m., of July 7, 1884, are entitled to the *per diem* compensation prescribed by law for the entire day; since this is one of the cases where the law recognizes no fractions of a day. As they served during the entire official day in good faith, they were legal agents of the United States up to one o'clock, p. m., and after that *de facto* agents, and their acts as such are valid. An officer *de facto* is not generally entitled to fees or compensation from the United States (9 Op. Att.-Gen., 433; Hunter's case, 1 Lawrence, Compt. Dec., 2d ed., 151; Evans's case, 3 Lawrence, Compt. Dec., 111). The appropriation, out of which the compensation of internal-revenue agents is to be paid, is for this and for other purposes a gross sum, sufficient in amount to pay all such agents now authorized, and also the five whose periods of service have expired by operation of the act of July 7, 1884.

The Commissioner of Internal Revenue will be advised that payments can lawfully be made to the five internal-revenue agents mentioned for the services rendered on July 7, 1884.

TREASURY DEPARTMENT,

First Comptrol'er's Office, July 23, 1884.

IN THE MATTER OF THE CONSTRUCTION OF THAT PART OF THE DEFICIENCY-ACT OF JULY 7, 1884, (23 STAT., 239) WHICH APPROPRIATES MONEY TO BE PAID TO THE STATE OF CALIFORNIA ON ACCOUNT OF HER QUOTA OF THE DIRECT TAX UNDER THE ACT OF AUGUST 5, 1861.—(12 STAT., 295)—CALIFORNIA CASE.

The deficiency-act of July 7, 1884 (23 Stat., 239), appropriates *specified sums* to be paid respectively, to the States named, for "the fifteen *per centum* of the amount of their quota of the direct tax of eighteen hundred and sixty-one." Fifteen *per centum* of said quota for California is \$38,180.80; the sum specified as appropriated for said State is \$37,191.17. *Held* :

1. In construing this act, and in determining the amount to be allowed to the State of California under it, the *intention* of Congress is to control.
2. The intention of Congress, as expressed in the act, was, to allow said State the full amount of the fifteen *per centum* mentioned, which is \$38,180.80.
3. *Jordan's case* (3 Lawrence, Compt. Dec., 274; s. c., 4 *Id.*, 5864) re-affirmed.
4. The opinion of the Court of Claims in *Jordan's case* (19 Ct. Cl.)—not concurred in.

The deficiency-appropriation-act of July 7, 1884 (23 Stat., 239), makes an appropriation, as follows :—

"To enable the Secretary of the Treasury to pay to the States of California, Oregon, and Nevada, respectively, the *fifteen per centum* of the

Government; and whether the rule adopted in withholding such moneys has been applied alike to all the States.*

"In reply thereto I have the honor to inclose a statement showing what amount of the war tax of 1861 is due and unpaid; from what States due; and the portion thereof which has been paid by withholding moneys due to States from the General Government and by collections through the direct-tax commissioners.

"The rule adopted in withholding moneys due from the General Government has been applied alike to all the States.

"Very respectfully,

"CHAS. J. FOLGER,

"Secretary.

"HON. GEORGE F. EDMUNDS,

"President pro tempore of the United States Senate."

"UNPAID WAR TAXES.

Statement of the condition of the direct-tax accounts of the several States and Territories and the District of Columbia, under acts of August 5, 1861, and June 7, 1862.

State or Territory.	Amount imposed.	Amount paid.	15 per cent allowance.	Balance due United States.
Alabama.....	\$529,313 33	\$8 49 46		\$520,821 87
Arkansas.....	261 886 00	184,082 18		77,803 82
California.....	254,538 67	247,941 13		6,597 54
Colorado.....	22,905 33	1,516 89		21,388 44
Connecticut.....	308,214 00	261,987 90	\$46,232 10	3,241 75
Dakota.....	3,241 33			
Delaware.....	74,683 33	74,683 33	\$4,350 50	
District of Columbia.....	49,437 33	49,437 33		
Florida.....	77,522 67	43,529 81		33,992 86
Georgia.....	584,367 33	71,407 75		512,959 58
Illinois.....	1,146,551 33	974,568 63	171,982 70	
Indiana.....	904,875 33	769,144 03	135,731 30	
Iowa.....	452,088 00	384,274 80	67,813 20	
Kansas.....	71,743 33	71,743 33		
Kentucky.....	713,695 33	606,041 03	107,654 30	
Louisiana.....	385,886 67	268,515 12		117,371 55
Maine.....	420,826 00	357,702 10	63,123 90	
Maryland.....	436,823 33	371,299 83	65,523 50	
Massachusetts.....	824,581 33	700,894 14	123,687 19	
Michigan.....	501,763 33	420,498 83	75,264 50	
Minnesota.....	108,424 00	92,245 40	16,278 60	
Mississippi.....	413,084 67	74,742 57		338,342 10
Missouri.....	761,127 33	646,958 23	411,869 10	
Nebraska.....	19,312 00	19,312 00	(See note.)	
Nevada.....	4,592 67	4,592 67		
New Hampshire.....	218,406 67	185,645 67	32,761 00	
New Jersey.....	450,134 00	382,014 83	67,519 17	
New Mexico.....	62,648 00	62,648 00	(See note.)	
New York.....	2,603,918 67	2,213,330 86	390,587 81	
North Carolina.....	576,194 67	386,184 45		190,010 22
Ohio.....	1,567,089 33	1,332,025 93	235,063 40	
Oregon.....	35,140 67	35,140 67		
Pennsylvania.....	1,946,719 33	1,654,711 43	292,007 90	
Rhode Island.....	116,963 67	99,419 11	17,544 56	
Tennessee.....	669,498 00	387,722 06		281,775 94
Texas.....	335,106 67	130,008 06		205,098 61
Utah.....	26,982 00			26,982 00
Vermont.....	211,068 00	179,407 80	31,660 20	
Virginia.....	1729,071 02	515,569 72		213,501 30
West Virginia.....	1208,479 65	181,306 93	27,172 72	
Washington.....	7,755 33	4,268 16		3,487 17
Wisconsin.....	519,688 67	429,196 68	39,346 43	51,145 56
South Carolina.....	363,570 67	377,961 30	14,390 63	

* Included on compromise.

† Joint resolution February 25, 1867, authorized the Secretary of the Treasury to transfer \$200,475 of the amount originally appropriated to Virginia to the State of West Virginia.

‡ Overpaid.

NOTE.

Nebraska:	
Amount collected.....	\$4,281 60
Amount allowed by act of August 7, 1882 (22 Stat., p. 314).....	15,030 40
	\$19,312 00
New Mexico:	
Amount allowed by act of July 1, 1862 (12 Stat., p. 489).....	\$2,648 00

TREASURY DEPARTMENT, March 29, 1884."

Construction of Direct Tax Deficiency Act—California Case. 337

"Letter from the First Comptroller to the Secretary of the Treasury, recommending the passage of bills H. E. No. 110 and Senate No. 795, 'To adjust certain accounts between the United States and the several States and Territories and the District of Columbia.'

"TREASURY DEPARTMENT,
"FIRST COMPTROLLER'S OFFICE.
"Washington, D. C., May 2, 1884.

Hon. CHARLES J. FOLGER,
Secretary of the Treasury:

"SIR: I have the honor to state that I have received a letter from the Hon. Wade Hampton, of the Senate of the United States, dated 24th ult., transmitting to me a copy of Senate Bill No. 795, 'to adjust certain accounts between the United States and the several States and Territories and the District of Columbia,' and asking me to give my views on it.

"I have also received a letter dated 25th ult. from the Hon. Barclay Henley, of the House of Representatives, transmitting a copy of House Bill No. 110, which is in form similar to said Senate bill.

"This latter letter is addressed to you and to me jointly, 'to be furnished with the views' of the Treasury Department and with mine also in relation thereto.

"The object of these bills is to remit, so far as not collected or paid, the direct taxes laid upon and apportioned to the States, Territories, and District of Columbia under the Direct tax act of August 5, 1861, and to refund to such States, Territories, and District, respectively, the amount of such taxes, so far as paid in any mode whatever.

"I have considered the subject with care, and now have the honor to state that, in my judgment, it is alike just, judicious, and practicable to remit all such taxes not yet collected, to refund the amounts paid in any form by any State or Territory, and to refund to private persons or their legal representatives all amounts of such tax by them paid, or collected by sale of real estate, or otherwise.

"I have accordingly prepared the draft of a bill to effect these objects, which I have the honor to submit for your consideration.

"I will briefly state some of the reasons in support of the views above presented. The amounts apportioned to States which have not in any form paid or been credited with any sums as the accounts stand in this office are as follow:

Alabama	\$529,313 33
Arkansas	261,886 00
Dakota	3,241 33
Florida	77,522 67
Georgia	594,367 83
Louisiana	385,886 67
Mississippi	413,084 67
New Mexico	62,648 00
North Carolina	576,194 67
South Carolina	363,570 67
Tennessee	669,498 00
Texas	355,106 67
Utah	26,982 00
Virginia	\$937,550 67
Less	208,479 65
	729,071 02
	5,038,373 03

"These are the sums charged against the States and Territories mentioned, all of which, as stated, appear by the records of this office as unpaid. It is proper to say, however, as to all these, except Alabama, Dakota, New Mexico, and Utah, that payments for each have been made into the Treasury by Direct Tax Commissioners, which have not been settled in this office.

"Most of these payments are shown in the letter of the Commissioner of Internal Revenue appended to the Georgia case, 4 Lawrence, Compt. Dec., 380. So, to a limited extent, other payments have been made, but not yet credited.

"I. As to the amounts thus apportioned, and which remain unpaid, only three things can be done:

"1. They can be paid by an increase of taxes in these States if they should respectively assume payment;

"2. Or they can be paid by enforcing collection by act of Congress of assessments against the real estate of private owners thereof; or

"3. They can be left uncollected.

"1st. It is certainly well understood that the burden of taxation under State and local authority in these States is such that it cannot be desirable to increase it. It

it not at all certain that these States would increase and collect taxes for this purpose. With the general feeling which now so fortunately prevails in favor of Congressional aid to States to promote common-school education, it is quite evident that Congress will not require any such taxes to be levied.

"There is no necessity now for requiring the payment of these amounts. The revenues of the Government are more than abundant, and it is not at all probable that conditions will ever exist to require the payments of these amounts.

"2d. The same reasons operate against enforced collections under the authority of an act of Congress. In fact, it is believed that there is no desire now on the part of any class of citizens that the payment of this tax should be enforced. This in part grows out of the considerations, having almost universal assent, that direct taxes are unequal, and hence unjust.

"The apportionment against States is made on the basis of population, and not wealth, and is hence unequal as between States.

"When collection is enforced by authority of Congress against real estate, the inequality and injustice are aggravated, because the burden is imposed on a species of property generally less productive of profit than any other, and hence least able to bear it; and chattel wealth, including a vast amount of corporate resources, constituting in all a large proportion of the aggregate of all forms of property, totally escapes from all burden, while requiring and receiving more of the protecting care of Government, and hence realizing benefits at the expense of the owners of real estate.

"The objectionable character of direct taxes is shown by the fact that they have been authorized but three times since the adoption of the Constitution. And although the act of August 5, 1861 [12 Stat., 294], provided 'that a direct tax of twenty millions of dollars be and is annually laid upon the United States,' yet the purpose to collect all beyond one year has been abandoned.

"It may then be assumed that the direct taxes collected were unequal and unjust, as between the States, and still more so among the property owners of the United States.

"A wrong having thus been done, it should be repaired by remitting the taxes not collected, and refunding those collected, upon the same principle sanctioned in many statutes of remitting taxes improperly assessed, and of refunding those which have been improperly collected.

"3d. The result will undoubtedly be, that the amounts of direct tax not yet paid will remain unpaid.

"II. In view of all this the inquiry is now presented, whether anything, and if so, what, should be done as to (1) the States which have assumed and paid their respective quotas of the direct tax; and (2) as to those in which sums allowed by accounting officers in their favor, respectively, have been withheld and credited on account of the quota of such State.

"It seems to me advisable to refund to such States the amount so assumed and paid or withheld. This view is supported by all the considerations already mentioned, which show the inexpediency of enforcing payment in the States, the quotas of which have not been paid. The policy of refunding is supported by the manifest injustice of retaining money collected as direct taxes from some States from which others are exempt.

"Equality of burdens as among the States, in those cases in which they are imposed in fixed proportions directly upon the real estate therein, is simple justice.

"In such cases inequality is injustice.

"Assuming that no more of the direct tax should be collected, the only mode of securing equality is to refund the direct taxes collected. If this refund should be made, States would receive money substantially as follows:

Alabama.....	\$8,491 46
Arkansas.....	184,082 15
California.....	247,941 13
Colorado.....	1,516 49
Connecticut.....	308,214 00
Delaware.....	74,653 33
District of Columbia.....	49,437 33
Florida.....	43,529 51
Georgia.....	71,407 75
Illinois.....	1,146,551 33
Indiana.....	904,875 33
Iowa.....	452,088 10
Kansas.....	71,743 33
Kentucky.....	716,125 33
Louisiana.....	265,515 12
Maine.....	420,826 00
Maryland.....	436,223 33
Massachusetts.....	224,551 33

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Michigan	\$501,763 33
Minnesota	108,524 00
Mississippi	74,742 57
Missouri	761,127 33
Nebraska	19,312 00
Nevada	4,592 67
New Hampshire	218,406 67
New Jersey	450,134 00
New Mexico	62,648 00
New York	2,603,918 67
North Carolina	3-6,194 45
Ohio	1,567,009 33
Oregon	35,140 67
Pennsylvania	1,946,719 33
Rhode Island	116,963 67
Tennessee	387,722 06
Texas	130,008 06
Vermont	211,068 00
Virginia	515,569 22
West Virginia	208,479 65
Washington Territory	4,268 16
Wisconsin	468,543 11
South Carolina	377,961 30

"Tables showing the condition of the direct tax accounts with the several States and Territories will be found appended to the Georgia case, 4 Lawrence, Compt. Dec., 376, 380. The first table shows the accounts as they stand adjusted in this office. The second table shows some payments not yet adjusted in this office, and hence the apparent discrepancy between the tables. There are still other credits to a limited extent as to some States, not shown by either of these tables.

"III. In some of the States the tax commissioners, under the direct tax of July 7, 1862 (12 Stats., 432), sold the real estate of many private owners, and thus collected in part the quota of tax apportioned to such States respectively. The Senate and House bills submitted for my consideration propose to refund directly to the State the taxes thus collected in each State. It is submitted that it would seem more equitable and just to refund directly to the private parties who paid such taxes, or whose lands were sold to enforce payment. This is the policy established as to the 'surplus proceeds' arising from sales 'after satisfying the tax, costs, charges, and commissions.' [Act August 5, 1861 (12 Stats., 304, sec. 36); act June 7, 1862 (12 Stats., 422); act June 8, 1872 (17 Stats., 382), act March 3, 1883 (22 Stats., 595).] It is not perceived that any State can have any claim to a refund of money paid by its citizens. It is believed the draft of a bill herewith submitted may be made the basis of a judicious mode of disposing of the subject to which it applies. The last clause of section two of the bill is added by reason of the undoubted rule of law learnedly discussed and clearly stated by the Supreme Court in *United States v. Ross*, 92 U. S., 284.

"I append hereto a table showing with substantial accuracy the amounts of taxes remaining uncollected in several States and Territories, and which it is proposed to remit, and the amounts which it is proposed to refund to the several States and Territories.

"I have the honor to be, very respectfully,

"WILLIAM LAWRENCE,

"Comptroller."

[Here follows a table which is the same as that appended to the letter of the Hon Secretary of the Treasury of March 29, 1884 (*ante*).]

"A BILL.

"Be it enacted, *fo.*, That the Secretary of the Treasury be, and is, authorized and required (1) to repay to the proper officer of each State the amount paid by such State for direct taxes, laid upon and apportioned to it as a direct tax under the direct tax act of August 5, 1861; and (2) to pay to the proper officer of any such State any and all sums allowed by the accounting officers of the Treasury Department as due to it, but withheld and credited on account of such direct tax; and (3) to place to the credit of the Commissioners of the District of Columbia, in the Treasury of the United States, a sum equal to the amount paid by or collected from said District on account of said direct tax; and (4) to cause to be audited by the proper accounting officers of the Treasury Department, and paid to the original legal owner or owners of every lot or parcel of land sold for non-payment of such taxes, or to his or their legal representatives, the amount paid at such sales, or otherwise collected, after deducting the

cost thereof, including charges and commissions not otherwise paid. And all such taxes laid upon any State, but not paid, are hereby remitted, and the charges made against such State therefor are canceled. All accounts with any State shall be so adjusted that taxes not collected are remitted, and amounts paid shall be refunded. And a sufficient sum of money is appropriated, out of any money in the Treasury not otherwise appropriated, to make the payment herein authorized. The word "State" herein shall include "Territory" and the "District of Columbia," so far as necessary to effect the objects of this act.

"SEC. 2. In making payments as aforesaid to the original legal owner or owners, or their legal representatives, of any lot or land sold for non-payment of direct taxes, and for refunding of the surplus proceeds of such sales as now authorized, (act August 5, 1861, 12 Stats., 304, sec. 36), and for refunding moneys collected, or repaying money withheld, evidence of payment to any officer authorized to receive it shall be deemed a payment into the Treasury of the United States."

"Letter from the Secretary of the Treasury, recommending the passage of bills H. R. No. 110 and Senate No. 795, to adjust certain accounts between the United States and the several States and Territories and the District of Columbia."

"TREASURY DEPARTMENT.

"June 14, 1884.

"Hon. A. J. WARNER,

"Chairman of sub-committee of

"Committee on Claims, House of Representatives :

"SIR: I have the honor of acknowledging the receipt from you of H. R. bill No. 110, entitled '*A bill to adjust certain accounts between the United States and the several States and Territories and the District of Columbia.*'"

"This bill relates to the direct tax of \$20,000,000 annually laid upon the United States, and apportioned to the States, the Territories, and the District of Columbia, under the act of Congress passed August 5, 1861 (12 Stat. at Large, page 294.)"

"The purpose of the bill is to relieve and discharge from further liability for that tax those States and Territories which have not paid the portion thereof apportioned to them respectively; and to repay, out of any money in the Treasury not otherwise appropriated, to those States and Territories which have paid any portion, the sums by them respectively paid. Though by the act above cited this tax was made an annual one, an attempt to collect it for more than one year has never been made. By that attempt there were collected about fifteen millions of dollars, principally from the States which did not seek to go out of the Union; and there were left uncollected about five millions of dollars, principally in the States which did seek to go out of the Union. The sum uncollected remains a charge against these States, and, for the purposes of this letter, it may be assumed that it is a valid and enforceable charge. It is plain, however, that no legislator at this day would propose to raise revenue by a tax of that kind. There is no need of resorting to such methods. The revenues of the Government from sources not so extraordinary, and collectable by means and appliances not so objectionable as those involved therein, are ample for its purposes. They are, indeed, superabundant, and the concern of statesmen is rather how they may be reduced than how they may be increased. The Government then needs not the money to be got by enforcing this tax."

"At the same time, it is plain that to enforce it would put a grievous burden upon the people of the States which are in default in payment. It needs no array of facts to show this. Congress in one, if not both branches, has this session considered the proposition of large pecuniary aid to these people to help them place and keep up common schools, and the Senate has passed a bill therefor."

"If there be need for that succor, there would be no harm in enforcing this charge. It is to be considered, too, that while taxes are seldom looked upon with favor, this would be specially objectionable. The purpose for which it was laid can but be remembered with distaste. It can scarcely be expected that there would be cheerful aid from the State authorities in the enforcement of it. It may be doubted whether there would be any. Indeed, it would, without further legislation, have to be enforced by the machinery provided by the act under which it was laid. This would call for the appointment of numerous Federal officials, who would go among the people as obnoxious exactors. I think it must be conceded that there is, and ever will be, great reluctance to ever setting about the collection of this tax. That it never had great favor, is shown by [the fact] that it was never put in force but one year. In practical effect, then, the law for it is obsolete. Why, then, should there remain this unenforced liability, a menace to the people, the enforcement of which is called for by no public need, nor by any public opinion?"

"In my judgment, the people and the property of the States in default should be relieved and discharged from it."

"But to give such relief and discharge would be to put an inequality of burden upon the States which paid, unless they in turn were in some way relieved. This the bill proposes to do by repaying to them the sums received from them. Assuming that the tax was lawful, and the collection, as far as made, was warranted, this, apart from the circumstances, would be a proposition to donate to the States surplus moneys of the United States—a proposition which I should not favor. But, as connected with the proposition to discharge from onerous and needless liability one portion of the people, it takes on a different character: it is presented as an adjustment between different bodies of the people, and is worthy of acceptance. Indeed, it would be unjust to the people of the loyal States to release the people of the once insurrectionary States from their liability without refunding to the former the sums paid by them, and there are analogies in the legislation of Congress. Acts have been passed refunding to States moneys raised by them for the raising, arming, and equipping of troops for the Army of the United States in the civil war, and for making other refunds of like character. The purpose of laying this direct tax was to aid in the ultimate payment of the extraordinary expenses of the Government caused by the civil war. The raising, arming, and equipping of troops by the States served to keep down those expenses for the time. It was a voluntary act upon the part of the States. There is no violation of principle or fundamental law in repaying to the States from the funds of the United States the cost thereof. The purpose and effect of this bill is not so unlike in nature to that as not also to be freed from the objections to a bald distribution among the States of what are called the surplus revenues of the United States.

"Under the peculiar facts of the case, and as it is not likely to become a precedent for other disposals of Federal moneys, my judgment is, that the proposed measure is a good one. It is true that exactly equal justice cannot be done in carrying out the proposition of the bill. Thus, in some of the Southern States the tax was to some extent enforced. Tax sales were made of pieces of real estate in instances for less than the value of them. Only the surplus of purchase-money over the tax and charges has been available to the owners, and they have lost the difference between that and the total of the purchase-money, and between the purchase-money and the real value.

"On the other hand, in most, if not all, of the Northern States the payment to the United States of the tax was assumed by the State government, which collected the amount, of its own people, in its own tax-levy. Of course, in the changes of citizenship and of ownership of taxable property, while a repayment into the State treasury will tend to reduce the amount of State tax, it will not inure to the benefit of some of those who in 1861 were tax-payers. But these failures of full and general compensation in dealing with transactions so long past must ensue, and are not to be potentially urged against proposed measures which in the main do work equal benefit.

"It is worthy of consideration, too, whether this is not a suitable occasion to deal with the matter of the Federal surplus moneys deposited or to be deposited with the States by the act of 1836. (5 *Stats. at Large*, 55, 207.)

"Why may not those States which made payment of their portion of the direct tax under the act of 1861 be debited in the settlement proposed by the bill before your committee with the amount of that deposit made with them, and be paid the balance, and thus the liability to the United States under the deposit act be extinguished?

"Thus the anomalous state of things existing under the last-named act would be ended, so far as those States are concerned.

"It is true that some of the States, as Virginia and Arkansas, for instance, may not have received their full proportion of the deposit fund of 1836; and it is true that in remitting the liability of the States to repay the deposit with them, there will, as to some of them, be no claim for a refund under this bill against which that liability may be set off; and that, therefore, complete equality of benefit and burden may not be realized. It is well to consider, however, whether, inasmuch as it is desirable that the relation of creditor and debtor between the United States and the States be closed, it should not be done at this favorable opportunity, though at the sacrifice of complete equality.

"In connection herewith, I refer to the 53d section of the direct tax act (see 12 *Stats. at Large*, pp. 311, 312), and suggest that there may be instances in which the principle of that section may be applied.

"I also inclose herewith a communication to me from the First Comptroller of the Treasury, which presents views in accord with some of those expressed by me, and gives tables of value, and a draft of a bill; and to this communication I ask attention.

Very respectfully,

"CHAS. J. FOLGER,
"Secretary."

IN THE MATTER OF THE CONSTRUCTION OF THAT PART OF THE DEFICIENCY-APPROPRIATION-ACT OF JULY 7, 1884 (23 STAT., 239), WHICH APPROPRIATES "TWO THOUSAND ONE HUNDRED AND NINETY DOLLARS, OR SO MUCH THEREOF AS MAY BE NECESSARY" "TO PAY DOCTOR D. M. BURGESS IN FULL COMPENSATION FOR SERVICES * * * FROM JULY FIFTEENTH, EIGHTEEN HUNDRED AND EIGHTY-TWO, TO JUNE SECOND, EIGHTEEN HUNDRED AND EIGHTY-THREE, AT THE RATE OF TWO THOUSAND FIVE HUNDRED DOLLARS PER ANNUM."—BURGESS'S CASE.

The deficiency-appropriation-act of July 7, 1884 (23 Stat., 239), appropriates "two thousand one hundred and ninety dollars, or so much thereof as may be necessary" "to pay Doctor D. M. Burgess in full compensation for services rendered by him as health inspector at Havana, Cuba, from July fifteenth, eighteen hundred and eighty-two, to June second, eighteen hundred and eighty-three, at the rate of two thousand five hundred dollars per annum." Said sum of \$2,190 differs from the amount computed at the rate and for the time specified.

Held:

1. The sum specifically appropriated does not control or limit the amount to be paid.
2. The amount to be paid is to be ascertained by computing compensation *at the rate* of \$2,500 *per annum* for the period from July 15, 1882, to June 2, 1883.
3. The general rule, in the absence of all other controlling circumstances, is, that, in a statute, time is to be computed from a specified day to a subsequent specified date, by excluding the first, and including the last, named date.
4. But this general rule may be controlled by official facts and circumstances known, or legally presumed to be known, to Congress at the time when the statute was passed.
5. Jordan's case (3 Lawrence, Compt. Dec., 274; s. c., 4 *Id.*, 586), re-affirmed.
6. The modes of computation for compensation of officers and employes of the United States explained.
7. Statutes are to "be construed with reference to the usages of the Treasury Department."

The deficiency appropriation-act of July 7, 1884 (23 Stat., 239), contains an appropriation, as follows:—

"To pay Doctor D. M. Burgess in full compensation for services rendered by him as health inspector at Havana, Cuba, *from July fifteenth, eighteen hundred and eighty-two, to June second, eighteen hundred and eighty-three*, at the rate of two thousand five hundred dollars *per annum*, two thousand one hundred and ninety dollars, or so much thereof as may be necessary."

If Dr. Burgess is entitled to compensation *at the rate* of two thousand five hundred dollars *per annum*, "from July fifteenth, eighteen hundred and eighty-two, to June second, eighteen hundred and eighty-three", *to be computed by the month and fraction of a month*, there are four modes in which such compensation may be considered:

1. If both dates named are *included*, the amount is \$2,211.45.
2. If both dates are *excluded*, the amount is \$2,197.79.
3. If the first named date is excluded, and the last included, the amount is \$2,204.73.

4. If the first named date is included, and the last excluded, the amount is \$2,204.51. If the computation is to be made by the "Government Salary Tables," the amounts for the four periods above mentioned in their respective order will be (1st) \$2,212.63, (2d) \$2,198.97, (3d) \$2,205.84, (4th) \$2,205.76.

The first computation is made by dividing the year into 12 months, and the months into such a number of parts as there are days in it; so that a month is one-twelfth of the whole year, and a day one-thirtieth, or one thirty-first, &c., of the month, according to the number of days in it. Thus, for ten entire months there are ten-twelfths of \$2,500, which are \$2,083.33; for 17 days of July there are seventeen-thirty-firsts of one-twelfth of \$2,500, which are seventeen-thirty-firsts of \$208.33, which are \$114.24; and for 2 days of June there are two-thirtieths of one-twelfth of \$2,500, which are two-thirtieths of \$208.33, which are \$13.88—making a total of \$2,211.45 for ten months, seventeen days of July, 1882, and two days of June, 1883.

The second computation is made by dividing the year into quarters, and the quarter into as many parts as there are days in it; so that a quarter is one-fourth of the whole year, a month thirty, or thirty-one &c., ninetieths, or ninety-firsts, &c., of the quarter, according to the number of days in the month and in the quarter, and a day one-ninetieth, or ninety-first, &c., of a quarter. Thus, in the instance before us, there are two entire quarters, the fourth and first, which are two one-fourths (\$625) of the year (\$2,500), which are \$1,250; two months (August and September) of the third quarter, which are sixty-one ninety-seconds of the quarter, which are \$414.40; two months (April and May) of the second quarter, which are sixty-one ninety-firsts of the quarter, which are \$419; seventeen days of July of the third quarter, which are seventeen thirty-firsts of the thirty-one ninety-seconds of the quarter, which are \$115.49; and two days of June of the second quarter, which are two-thirtieths of the thirty-one ninety-firsts of the quarter, which are \$13.74—making a total of \$2,212.63, when both dates are included.

The second mode of computation is employed mostly in the Departments for the payment of employés, and the first mode is used for the payment of temporary or irregular employés outside of the city of Washington and the Department buildings. Whereas, an employé would obtain the same amount of salary for a year, or for a quarter, by either method of computation, yet, the monthly payments by the two methods described would not be the same; since the months contain an unequal number of days, which are taken into account by the second mode of computation. Thus, by the first method \$208.33 is the amount of compensation due to an employé at \$2,500 per annum for the month of January, 1883, being one-twelfth of a year (\$2,500); and by the second method \$215.30 is the amount due to him, for the same month, being thirty-one ninetieths of the first quarter (\$625). Dr. Burgess had been in the service of the National Board of Health as Health Inspector at Havana, Cuba, and was paid for his services, to and including July 15, 1882.

For want of an appropriation to further employ him he was notified that there was no authority to continue him in the service; but at the request of a consular officer he did continue in service to and including June 2, 1883;—hence, the appropriation made by the deficiency-act of July 7, 1884 (23 Stat., 239).

The First Comptroller is asked to decide what sum shall be by appropriation-warrant carried to the credit of said appropriation.

DECISION BY WILLIAM LAWRENCE, *First Comptroller*.

This case presents several questions:

1. If the sum of \$2,190, named in the deficiency-act controls the appropriation, and, so, limits the amount to be paid, no further inquiry can be made: but it has been decided, in principle, that such sum does not, and that any error therein may be corrected, and the true amount ascertained, according to the actual intention of Congress, if the act gives the means of doing so (Jordan's case, 3 Lawrence, Compt Dec., 274; s. c., 4 *id.*, 586; California case, *ante*, 333). The deficiency-act of July 7, 1884 (23 Stat., 239), does furnish such means. It declares a purpose to pay Dr. Burgess compensation for services, "at the rate of two thousand five hundred dollars per annum", for the period "from July fifteenth, eighteen hundred and eighty-two, to June second, eighteen hundred and eighty-three". Thus, the act has a manifest purpose, to authorize payment *at a rate*, and *for a period*, clearly specified. Either this rate for the period mentioned, or the sum specifically appropriated, is to be *ignored*. The statute should be so construed, if possible, as to give some effect to every clause and word thereof. The provision fixing a rate and period of compensation has a clear purpose. It furnishes the basis on which Congress intended to act in determining the amount of compensation. No reason can be assigned for ignoring this clearly defined basis, or for nullifying the words used to express it. A reason can be given for ignoring the specific sum appropriated in the act. The fact that a basis for ascertaining the amount to be paid is given in the act, shows that the sum appropriated was not intended to be an arbitrary one, but was to be fixed by a prescribed rule. But there is a palpable error in the amount specified, as judged by any mode of construing the words prescribing the basis, or rate and period, of compensation. The rate and period prescribed must, therefore, control the error in the specific amount appropriated. This view is strengthened, rather than weakened, by the words of the act—"or so much thereof as may be necessary." They recognize *said rate and period* as the means of ascertaining the true result, and are equivalent to saying that the amount to be paid is so much as is necessary on the basis prescribed. The words mentioned, literally construed, might imply that *only a part* of the gross sum appropriated would be necessary; if so, this only shows that the deficiency-act did not fix an absolute sum, but left the amount to be determined by computation—which is precisely what said act does.

In fact, the expression above quoted is a *formula* frequently, if not generally, employed in appropriation acts, sometimes without any special necessity for it, and can have but little controlling weight in construing such acts. It is, therefore, held, that the amount appropriated is to be determined, not by the sum specifically named in the act, but by the basis, or rate and period, of compensation prescribed therein.

II. The more difficult question to decide is, whether *both dates* named in the act are to be included or excluded in the computation, or whether only one is to be; and if so, which one? In *Sheets v. Selden's Lessee* (2 Wall., 190), Field, J., said that:—

"The general current of the modern authorities on the interpretation of contracts, and also of statutes, where time is to be computed from a particular day or a particular event, * * * is to *exclude* the day thus designated, and to include the last day of the specified period." (Cornell v. Moulton, 3 Den., 16; Bigelow v. Willson, 1 Pick., 485; Arnold and others v. The United States, 9 Cranch, 104; Connor v. Pugh's Lessee, 18 How., 394; Board of Commissioners v. Gorman, 19 Wall., 661; Bishop, Written Laws, 105-111, 218; Sedgwick, Construction Stat. and Const. L., 2d ed., 356; Bouvier, Law Dic., Title "Time"; Lawson, Concordance, Title "Time", 356.)

It may be regarded as settled, that there is no absolute rule for determining whether, in cases such as this, either, or both, of the dates named are necessarily to be *included* or *excluded*. The intention is to be gathered from all the permissible sources which may aid construction, including the surrounding facts and circumstances (2 Parsons, Contracts, 6th ed., 662, citing Pugh v. Duke of Leeds, 2 Cowp., 714).

The deficiency-act of July 7, 1884 (23 Stat., 239), was passed by Congress in view of the facts that Dr. Burgess had been in service, and was paid therefor, to and including July 15, 1882, and that he was continuously in service *after* that date to and including June 2, 1883. He is, therefore, entitled to payment for the period of service, 322 days, commencing with July 16, 1882, at the rate of \$2,500 per annum, the amount of which payment, being \$2,204.73, is to be computed according to the usual method for officers or employes not connected with an Executive Department in Washington. It is to be presumed that Congress intended payment to be made in accordance with the usage which prevails as to such officers or employes generally (5 Op. Att.-Gen., 187, 190, 217, 218, 5-2). *Consuetudo loci est observanda* (Broom, Legal Max., 7th ed., 918). A statute "should be construed with reference to the usages of the Treasury Department" (United States v. Bailey, 9 Pet., 238).

III. Since the claimant is entitled to compensation for 322 days, commencing with July 16, 1882, and ending with June 2, 1883, there are *three* modes of making the computation at the rate of \$2,500 per annum:

1. In *literal* exactness, the compensation for 322 days at \$2,500 per annum will be \$2,205.47 $\frac{2}{3}$, as determined by proportion—365 : 322 :: \$2,500 : \$2,205.47 $\frac{2}{3}$. As the fraction of a cent, thus produced, is more than one-half of this one-hundredth part of the unit of value, the true

sum to be paid, *if this basis could be adopted*, would be \$2,205.48, both because the law recognizes no fraction of a cent, not having provided any coin or other legal tender below one cent (Rev. Stat., 3515), and because of the maxim, *de minimis non curat lex*. This mode of computation, in the absence of any usage on the subject, is the legal one in transactions between private parties, involving questions like that now under consideration. But such mode has never been adopted by the Government.

2. The second mode of payment is by dividing the year into twelve equal parts representing the months. Under this mode the same sum is paid for a month of 28, 29, 30, or 31 days. The President and Members of Congress are paid thereunder, with modifications for convenience as to fractional parts of a dollar. Thus, Members of Congress are paid \$417 a month for two months, and \$416 for the succeeding month, and so on through the year, aggregating the annual salary of \$5,000. Under the legislative, executive, and judicial appropriation-act of July 7, 1884 (23 Stat., 162), the Senate Reporter is paid in the same way. Section 55 of the Revised Statutes makes special provision as to the salaries of the Chaplains of the two Houses of Congress. Under the mode stated, in case of death, resignation, or removal, fractions of a month are computed by dividing the monthly salary into as many parts as there are days in the month, and payment is made on this basis for the actual days of service. The statute requires the salaries mentioned to be paid monthly (Rev. Stat., 38, 55, 153, 154, 3622). This rule is adopted generally in paying temporary officers and irregular employes not immediately connected with the Executive Departments in Washington City, who do not receive annual or quarterly salaries, and, so, is the rule in this case. A statute may "be expounded with reference to a general usage" (Bishop, Written Laws, 104; *Love v. Hinckley*, 1 Abb., Adm., 436; *Delaplane v. Crenshaw and Fisher*, 15 Gratt., 457; *Harcastle*, Statutory Law, 69; *Sedgwick*, Construction Stat. and Const. L., 2d ed., 215; *United States Bank v. Halstead*, 10 Wheat., 63). This is on the principle that a known and general usage is as much a part of the statute, when not in opposition to its words, as if therein incorporated (*Murdock's Appeal*, ante 314)—the same principle by which in contracts "incidents" are "annexed" by usage (1 Greenleaf. Ev., § 294).

3. A third mode of computation is that adopted in the "Government Salary Tables" and explained above. It is in general use in the Executive Departments in paying the officers and employes therein. It is also employed in paying nearly all of the officers and employes of the two Houses of Congress, and in paying the judges of the United States courts, and all officers and employes entitled by law to fixed annual or quarterly salaries. The usage adopted by the "Government Salary Tables," doubtless grew up under the "Act for establishing the Salaries of the Executive Officers of the Government, with their Assistants and Clerks," approved September 11, 1789 (1 Stat., 67), which prescribed "annual salaries, payable quarterly at the Treasury of the United States,"

for the officers and employes of all the Executive Departments. See act of March 2, 1799 (1 Stat., 730). The act of September 11, 1789, has not been incorporated in the Revised Statutes, and is regarded as obsolete (1 Stat., XVII). Under that act the salary-year was divided into four quarters representing three months each, and an equal amount of the salary was paid for each quarter, although the quarters did not contain an equal number of days. Since said act was passed, various statutes have been enacted, providing for monthly payments (Rev. Stat., 38, 153, 160, 200, 234), so that the original reason for the rule in the "Government Salary Tables," as a general regulation, no longer exists. In certain instances, by virtue of section 3622 of the Revised Statutes, authority has been given to some disbursing officers to render their accounts quarterly, though they are generally rendered monthly. There is no provision fixing the time for paying the salaries of clerks and employes in the Executive Departments, except inferentially from section 3622 of the Revised Statutes.

Thus, a usage, which grew up under the act of September 11, 1789, has survived the reason upon which such usage originated. But it has now been so long continued that it has become a rule of property, and it is not expedient to change it.*

*The following is the title of the "Government Salary Tables" now in use:—

"Government Salary Tables Adopted by The Comptrolling Officers of The Treasury Department, for use in The Payment of Persons in Civil Employments who Receive Annual or Quarterly Salaries. Compiled, Under The Direction of the Chief Clerk of The Treasury Department, by David S. Green. Washington, Government Printing Office, 1872."

When this table was prepared, a regulation was prescribed, as follows:—

"TREASURY DEPARTMENT, July 1, 1872.

"The following salary tables are prescribed as the rule for paying persons in civil employments who receive annual or quarterly salaries. This order will take effect from and after June 30, 1872, and all disbursing officers and agents will make their pay-rolls and render their accounts accordingly.

"R. W. TAYLER,

"First Comptroller.

"J. M. BRODHEAD,

"Second Comptroller.

"W. T. HAINES,

"Commissioner of Customs.

"Approved :

"GEORGE S. BOUTWELL,

"Secretary."

The salary table is preceded by a notice, as follows:—

NOTICE.

To avoid inconvenience in the payment of monthly salaries, it will be observed that in these tables the computations have been varied in the monthly division of the quarters to conform as nearly as was practicable to even tenths of dollars.

That part of the table should only be used in paying salaries by the month; any annual salary paid for a less period than one month should be computed from the per diem column of the proper quarter.

To illustrate this, suppose a salary of \$1,800 per annum is to be paid for the month of June, (30 days.) This will be found in the first column, on page 67, and is \$148.30. Suppose, however, the payment is to be made for the month of May, (31 days,) and 29 days in June. In the first column May is \$153.40, and in the column under "second quarter," 29 days is \$143.41, or $\$153.40 + \$143.41 = \$296.81$.

The mode of payment adopted by the order of Secretary Boutwell was that which had always existed in the Treasury Department.

The appropriation-warrants, as to the item referred to in the deficiency act of July 7, 1884 (23 Stat., 239), upon which the decision of the First Comptroller is asked, will specify \$2,204.73 as the proper amount.*

TREASURY DEPARTMENT,

First Comptroller's Office, July 24, 1884.

* The following regulation is in force:—

(General orders No. 33.)

**HEADQUARTERS OF THE ARMY,
ADJUTANT GENERAL'S OFFICE,
Washington, March 24, 1870.**

The following circular from the office of the Second Comptroller, Treasury Department, containing rules for the computation of time in making payments to employes of the Government, is, by direction of the Secretary of War, published for the information of all concerned.

The rule therein laid down to govern payments for service will hereafter apply to payments for commutation of quarters and fuel.

[CIRCULAR]

**TREASURY DEPARTMENT,
SECOND COMPTROLLER'S OFFICE,
Washington, March 1, 1864.**

The rules for the computation of time in making payments to employes of the Government having been so construed as in many cases to operate unjustly against the Government, the following have been adopted and will be observed, when applicable, in all payments made hereafter:

1. The law providing compensation having ignored unequal durations of months by allotting the same pay to each, and the pay tables having, for convenience, subdivided each month's pay into thirty equal parts, thus paying, in twelve months of thirty days each, the full salary provided by law for the entire year, the months should be assumed, in computing pay, as they are by law, to be of equal length, any other duration than thirty days being ignored.

2. To conform with the foregoing, to secure greater accuracy in computation, and to save the trouble and delay of four distinct calculations of monthly pay in hereafter computing the time of service of Government officers and employes, thirty days will be assumed as the length of each and every month in the year.

3. For any full month's service performed by persons employed by the Government at a stipulated monthly rate of compensation (or yearly salary, if paid in regular monthly or bi-monthly installments), payments will be made at such stipulated monthly rate, without regard to the number of days the months paid for may contain.

4. In cases when the service commences on an intermediate day of the month, and thus embraces only a fractional part thereof, thirty days will be assumed to constitute the entire duration of such month, whether the calendar length thereof be 28, 29, 30, or 31 days, and pay will be computed accordingly.

5. When the service terminates at an intermediate day of the month, and hence embraces but a fractional part thereof, the whole number of days during which service was rendered in such fractional part of a month will be allowed in making payments.

6. For convenience in calculating service embracing two or more months, or parts of months, but one fraction will be made. Thus, from the 21st of September to the 25th of November, inclusive, will be calculated: from 21st of September to 20th October, inclusive, as one month; from October 21 to November 20, inclusive, another month; and from 21st to 25th November, inclusive, five days—making two months and five days.

7. When two fractions of months occur in any account for service, both together being less than a whole month, as from the 21st of August to the 10th of September, the calculation of time will be from August 21 to 30, inclusive (ignoring the 31st), ten days, and from the 1st to the 10th September, inclusive, ten days—making the time to be paid for twenty days.

8. Service commencing in February will be calculated as though that month contained thirty days; thus, from February 21 to end of month, inclusive, ten days will be allowed, though the actual time be but eight or nine days; provided, that when service commences on the last day of February, payment will be made for only one day in that month.

9. The foregoing rules do not apply to commutation of rations, nor to laborers employed at a per diem allowance. In computing them the actual number of days are to be ascertained and allowed.

10. Laborers employed by the month, and actually performing their first day's labor on the 31st day of any month, will be paid for that day.

11. Soldiers rendering little or no service on the day of enlistment or discharge, payment for both by the Government is unjust. The day of enlistment, therefore, will hereafter be allowed, and the day of discharge excluded.

12. Individual pay accounts and company and staff pay-rolls should distinctly specify the exact time during which officers actually rendered service, under authority entitling to pay, in the grade for which pay is claimed.

13. When accounts are hereafter rendered for service stated to have been performed from one given date to another, one of the days named will be excluded, unless it is specified or clearly shown by the form of the account that the service rendered was inclusive of both.

By command of General Sherman :

Official :

J. M. BRODHEAD,
Comptroller.

E. D. TOWNSEND,
Adjutant General.

Assistant Adjutant General.

IN THE MATTER OF THE RIGHT OF CIRCUIT COURT COMMISSIONERS
TO FEES FOR ADMINISTERING AND CERTIFYING OATHS, ATTACHED TO
VOUCHERS OF DEPUTY UNITED STATES MARSHALS IN SUPPORT OF
CLAIMS FOR SERVICES UNDER THE ELECTION LAWS.—COMMISSIONER'S
OATH-FEE CASE.

1. Deputy marshals appointed under section 2021 of the Revised Statutes may be required to verify their claims for compensation.
2. The Attorney-General, the Secretary of the Treasury, or the First Comptroller, has authority to require such verification, although no statute requires it.
3. The officer before whom such claims are lawfully verified by affidavit, is entitled to a fee of ten cents for administering each oath, and fifteen cents for each necessary jurat or certificate of the fact that the oath has been administered.
4. In Treasury Department practice a voucher is an account against the United States, with an acquittance thereon executed.
5. In the case of claims against the United States, which are by (1) law, (2) regulation, (3) usage, or (4) requirement of a Comptroller, to be verified by the claimants, a voucher is a verified claim against the United States and an acquittance thereon.
6. No statute expressly gives to circuit court commissioners authority to administer oaths, or certify affidavits in support of claims against the United States, nor is such authority incident to any power expressly given them by statute.
7. No regulation of the head of any executive department has given authority to such commissioners to administer oaths or certify such affidavits.
8. The Attorney-General, or Secretary of the Treasury, has authority, by regulation, to authorize such commissioners to administer such oaths, and certify such affidavits.
9. Such authority may exist without express regulation by usage, which is national executive common law.
10. In construing the Revised Statutes, reference may be had to the original statutes from which they were taken.
11. Construction given to the Revised Statutes, sections 161, 362, 363, 627, 628, 727, 728, 828, 847, 848, 854, 945, 1014, 1042, 1778, 1878, 1982-1987, 2181, 3479, 3622, 4079-4081, 5270, 5271, 5296, act, June 23, 1874 (18 Stat., 255, sec. 6), act, February 22, 1875 (18 Stat., 333).
12. The rule stated by which compensation is to be ascertained for services of clerks of courts (1) for administering oaths to jurors and witnesses to prove attendance at court, (2) for entering orders of court for their payment, and (3) for certificate to a marshal to authorize payment of the fees of jurors and witnesses.
13. The effect of "reference statutes" considered.

November 9, 1883, the judge, holding the circuit court of the United States for the southern district of New York, approved three accounts against the United States in favor of John A. Shields, a commissioner of the circuit court at New York City, "for administering oaths and making two certificates, original and duplicate, to vouchers for payment to special deputy marshals at the congressional elections of 1880 [and 1882], by the United States Marshal of this district." The accounts of the commissioner give the names of deputy marshals to whom oaths were administered, with a charge of 40 cents in each instance for the services mentioned. One account is for \$737.20, for deputies for the congressional election in New York for 1880; one for \$446.80, for the

election of 1882; and one for \$314, for the same year—making in all \$1,498.

The deputy marshals were appointed under the authority of section 2021 of the Revised Statutes, their duties are prescribed by section 2022, and their compensation by section 2031. They are paid by the proper marshal, in discharge of his duties as a disbursing officer (1 Lawrence, Compt. Dec., 2d ed., 624, App., Ch. xv), who is required, by the act of February 22, 1875 (18 Stat., 333, sec. 1), to take duplicate vouchers for all payments. No statute specifically requires the accounts of the deputy marshals to be sworn to, but the instructions of the Department of Justice to the marshal for the Southern District of the State of New York, say :

"You will require each claimant to verify his claim by *affidavit* that he is the person named in the commission when you pay him and attach it to your account *as a voucher*, with the affidavit made by him." (Rev. Stat., 362, 368; Utah case, 2 Lawrence, Compt. Dec., 2d ed., 563.)

November 20, 1883, the First Auditor allowed the claimant \$1,498. The question is presented : whether the First Comptroller can properly certify this balance in favor of the Commissioner.

J. M. Deuel, in a similar case, before the First Comptroller, submitted an argument, as follows :

"For the service, the following charge is made for each person sworn :	
Administering one oath	10c.
Certificate or jurat to original.....	15c.
Certificate or jurat to duplicate	15c.
LAW.	40c.

There can be no dispute as to the first item, the language of the statute, section 847, being 'For administering an oath ten cents.' To give value and permanence to the oath, the commissioner must attach a jurat, the definition of which, according to Bouvier is, 'That part of an affidavit where the officer certifies that the same was sworn before him.' Section 847 does not mention certificate by name, but the seventh paragraph reads: 'For issuing any warrant or writ, and for any other service, the same compensation as is allowed to clerks for like services.'

Turning to section 828, 'clerks' fees,' and in the eighth paragraph that officer is allowed, for making any certificate, for each folio, fifteen cents.

The term, 'folio,' means one hundred words and the jurat or certificate contains many less than one hundred words. But section 854, where the document is less than fifty words, makes it one folio.

The original and duplicate oath were each signed by the payee and were each certified by the commissioner. There were then two certificates or jurats at fifteen cents each.

The foregoing views have been sustained by the courts.

In the case of 'The schooner, *F. Merwin*,' in the district court of the United States for the Southern District of New York, the precise question of oath and jurat came before Judge Choate, who used the following language: 'The charge for 5 oaths at 10 cents and 5 jurats at 15 cents is objected to, on the ground that the fee of ten cents for administering an oath includes the service of the clerk in making the certificate of the administration of the oath—the jurat. I think the charge is

correct. The fee bill allows ten cents for administering the oath. It allows fifteen cents for making a certificate. The two services are distinct, and are both here rendered.' (10 Benedict, District Court Reports, 405.)

The items charged and the amounts thereof being correct, the question, whether it is chargeable against the United States, remains to be considered.

Section 2021 of the Revised Statutes makes provision for the appointment of special deputy marshals for election purposes, their compensation being fixed by section 2031, as follows: 'And there shall be allowed and paid to each supervisor of election, and each special deputy marshal who is appointed and performs his duty under the preceding provisions, compensation at the rate of five dollars per day for each day he is actually on duty, not exceeding ten days.' * * * The manner of paying, or through whom paid, is not specially provided for by statute. They are paid by the marshal, who by statute is compelled to obtain vouchers in duplicate—the duplicate being filed in court when his accounts are approved by the judge and the original transmitted to the Department at Washington. [Act, February 22, 1875, 18 Stat., 333.] The expense of executing this voucher should not be borne by the officer or person entitled to the pay:

(1) Because it is not executed for his benefit or advantage,
 (2) Because, if paid by him, he would receive less than the statutory *per diem*.

(3) Because, in other instances of parties entitled to a *per diem*, the expense of executing a voucher is borne by the United States.

With equal propriety, these men might be charged with the expense of printing or preparing the voucher or with the percentage allowed the marshal as a disbursing officer. The statute gives them five dollars per day, and they are entitled to the whole of it. If the government, for its own protection and its own conscience, requires the execution of a voucher, it must bear the expenses.

The custom and practice, in other instances, where parties are entitled to a *per diem*, in which the government pays the whole expense of executing the voucher, furnish a precedent for the payment here. Section 848 fixes the *per diem* of a witness at \$1.50. A witness is required to attend and give evidence for the United States before a commissioner, in a criminal case. Before he can obtain his *per diem*, he must execute a voucher, wherein he makes oath to his attendance and to his mileage. The expense is always borne by the Government and the accounting officers of the Department have always allowed the same to commissioners on the presentation of their accounts. A similar practice is observed as to the payment of jurors.* Each of these is paid by the

* In these cases the clerks of courts receive ten cents for administering the oath proving the attendance of each juror and witness. The usage is not to require an affidavit, and hence no fee is charged for a jurat. A fee is charged by the clerk for making report to the court of witnesses sworn, and so of jurors, in order that the fees of witnesses and jurors may be allowed for payment by the marshal. Commissioners charge fees for an order to the marshal to pay witnesses before them. One report should include all jurors, discharged at one time, and so one report should include all witnesses in a case, discharged at one time. Sometimes a marshal may not have money to pay the fees of jurors and witnesses, and, in such cases, a separate certificate for each witness may be necessary, in order subsequently to collect the proper fees. When no sufficient reason appears for making separate orders or reports, clerks are not entitled to a fee for each. The same may be said of the orders, made by clerks of courts, for the payment of witnesses, jurors, and other similar purposes. Separate should not be unnecessarily made, and if so made cannot be paid for.

marshal. Special deputy marshals also make oath to the service which they have performed, whereby they are entitled to a *per diem* and are also paid by the marshal.

Each one of the three classes named have a *per diem* fixed by statute, and in no one of them does the statute prescribe the *modus operandi* of payment. It is therefore respectfully submitted that the account presented should be audited and paid."

DECISION BY WILLIAM LAWRENCE, *First Comptroller*.

This case presents several questions, which will be considered.

I. Are deputy marshals, appointed under section 2021 of the Revised Statutes, required to verify their claims to compensation for services? No statute requires such verification, but the Attorney-General has required it in New York, and he had ample authority to do so. (Rev. Stat., 161, 362, 368; *United States v. Bailey*, 9 Pet., 238; *United States v. Babcock*, 4 McLean, 113; *Noble's case*, Dev., 84; *Dorsheimer's case*, 2 Ot. Cl., 103; *United States v. Savings Bank*, 104 U. S., 733.)

The usage of the Treasury Department, requiring verified accounts in those cases where it exists, is sufficient authority to require a verification, even where the statute requires none. The First Comptroller has authority to require verification. He has always exercised the power. In many cases he could not exercise the functions of his office and secure that justice to the government which the law requires, without exacting affidavits of claimants in support of their claims. The deputy marshals were therefore lawfully required to verify their claims for compensation.

II. What amount can lawfully be demanded by an officer, authorized to administer oaths for services such as those for which compensation is asked in this case?

1. A fee of ten cents is authorized for administering the oath to each deputy marshal, and fifteen cents for the certificate or jurat.

2. Is a charge of fifteen cents authorized for a certificate to a duplicate of the original account? The accounts of all disbursing officers are to be supported by vouchers (Rev. Stat., 3622; *Watkins v. United States*, 9 Wall., 764). The act of February 22, 1875 (18 Stat., 333), provides that:

"Accounts and vouchers of clerks, marshals, and district attorneys shall be made in duplicate, to be marked respectively 'original' and 'duplicate.' And it shall be the duty of the clerk to forward the original accounts and vouchers of the officers above specified, when approved, to the proper accounting officers of the Treasury, and to retain in his office the duplicates, where they shall be open to public inspection at all times. Nothing contained in this act shall be deemed in any wise to diminish or affect the right of revision of the accounts to which this act applies by the accounting officers of the Treasury, as exercised under the laws now in force."

This requires the "vouchers" of the marshals to be made in duplicate. The question therefore arises whether, in this case, a "*voucher*" is merely a statement of a claim and a receipt acknowledging its payment by the marshal, or whether it includes this *and* the affidavit required by the instructions of the Attorney-General. Bouvier defines the word, voucher, to mean, "any acquittance or receipt, which is evidence of payment, or of the debtor's being discharged." In *Whitwell & Others v. Willard* (1 Metc., Mass., 218) a voucher is defined "any acquittance or receipt, discharging a person, or being evidence of payment." In *The State v. Hickman* (3 Halsted's N. J. Law. R., 299), a voucher is defined, "any instrument which attests, warrants, maintains, bears witness."* (Consular-Accounts case, 3 Lawrence, Compt. Dec., 352; Consular-Draft case, *ante*, 88; *Watkins v. United States*, 9 Wall., 764).

The instructions of the Department of Justice as above given, require each deputy marshal to verify his claim for *per diem* compensation, by affidavit, and require the marshal to "attach it"—the claim so verified—to his "account as a voucher." For the purpose of this case, then, a voucher is more than an acquittance—it includes a verified account *and* an acquittance.†

And generally, in Treasury Department practice, in those cases in which claims are by law, regulation, usage, or requirement of a Comptroller, to be verified by the claimants, a voucher is a verified claim with an acquittance thereon. The duplicate vouchers, required by the act of

* Hickman was indicted, for that he did "feloniously steal, take and carry away one voucher of the value of fifty dollars, the property of Robert Lake," as follows: "Davis Wharf, April 18, 1825. Captain Robert Lake landed 22½ cords of oak wood and ½ cord of pine wood, all left for sale. To cash paid Robert Lake on account, \$25.00. Samuel Davis."

† The vouchers are in the following form:

UNITED STATES OF AMERICA,
Southern District of New York, ss:

Frederick Rotzler being duly sworn, deposes and says that he was duly appointed a special deputy marshal in pursuance of the provisions of section 2021 of the Revised Statutes of the United States, for the purpose of acting as such at and previous to the election held in the city of New York on the 8th day of November, 1881.

That at the time of said appointment he was a qualified voter of said city.

That he was actually on and performed his duty as required by the provisions of title XXVI, "The Elective Franchise," of the said Revised Statutes, four days and that he is entitled to receive for his services, at the rate of five dollars per day the sum of twenty (\$20) dollars.

FREDERICK ROTZLER.

Subscribed and sworn to before me, this 9th day of February, 1883.

W. R. SPOONER,

U. S. Com'r, So. Dist. N. Y.

I do hereby acknowledge the receipt of the sum of twenty (\$20) dollars from Joel B. Erhardt, United States marshal for the southern district of New York, in full payment for services rendered as special deputy marshal, as stated in the foregoing affidavit.

FREDERICK ROTZLER.

Dated New York, Feb'y 12, 1883.

February 22, 1875 (18 Stat., 333), as applied to the claims now under consideration, of deputy marshals in New York, must each include a verified claim and an acquittance.

III. Is a commissioner of a circuit court authorized to administer an oath to verify the account of a deputy marshal? No provision of the Revised Statutes nor any statute since enacted has given express authority to do so, nor is such authority incidental to any power expressly given by statute. Section 627 of the Revised Statutes declares that the commissioners "shall exercise the powers which are or may be *expressly* conferred by law." If a commissioner is not authorized to administer an oath, the formality of doing so is a nullity. An indictment for perjury cannot be sustained unless on an oath administered by some one duly authorized to administer it. (*United States v. Deming*, 4 McLean, 3.) If no statute gives to commissioners authority *generally* to administer oaths, yet the Attorney-General has ample authority by regulation to authorize them to administer oaths to persons and to attach jurors to vouchers (Rev. Stat., 161, 362, 368; *United States v. Babcock* 4 McLean, 113. Utah case, 2 Lawrence, Compt. Dec., 2d ed., 563). Thus in *United States v. Bailey* (9 Pet., 255) the question was presented, whether under the act of March 1, 1823 (3 Stat., 771, ch. 37, sec. 3), a conviction was lawful, for falsely swearing to a claim against the United States before a State justice of the peace who was not by any statute specifically authorized to administer such oath. The act of 1823 makes it a crime to "swear or affirm falsely * * * in support of any claim against the United States." Story, J., in deciding that the conviction was authorized, said :

' There has been a constant practice and usage in the treasury department in claims against the United States, and especially of a nature like the present, to require evidence by affidavits in support of the claim, whether the same has been expressly required by statute or not; and that, occasionally, general regulations have been adopted in the treasury department for this purpose. Congress must be presumed to have legislated under this known state of the laws and usage of the treasury department. The very circumstance, that the treasury department had, for a long period, required solemn verifications of claims against the United States, under oath, as an appropriate means to secure the government against frauds, without objection, is decisive to show that it was not deemed a usurpation of authority.

"The language of the act of 1823 should, then, be construed with reference to this usage. The false swearing and false affirmation, referred to in the act, ought to be construed to include *all cases of swearing and affirmation required by the practice of the department* in regard to the expenditure of public money, or in support of any claims against the United States. The language of the act is sufficiently broad to include all such cases; and we can perceive no reason for excepting them from the words, as they are within the policy of the act, and the mischief to be remedied." (See *United States v. Winchester*, 2 McLean, 135; *O'Mealy v. Newell*, 8 East, 364.)

This places the authority of a State justice of the peace to administer an oath upon a *usage* recognized by the Treasury Department,

which became a part of the act of 1823 as fully as though incorporated therein. (Murdock's Appeal, *ante*, 314; Burgess's case, *ante*, 342.) On principle, a universal long continued usage of the Treasury Department is national executive common law equivalent to and having the force of a regulation prescribed by the Secretary. (3 Lawrence, Compt. Dec., Introd., XXII.) In the opinion referred to, Justice Story shows that the Secretary of the Treasury had power, by express regulation having the force of law, to authorize a State justice of the peace to administer oaths to claimants. He says:

"It is a general principle of law, in the construction of all powers of this sort, that where the end is required, the appropriate means are given. It is the duty of the Secretary to adjust and settle these claims, and in order to do so he must have authority to require suitable vouchers and evidence of the facts, which are to establish the claim. No one can well doubt the propriety of requiring the facts, which are to support a claim, and rest on testimony, to be established under the sanction of an oath; and especially in cases of the nature of those, which are referred to in the act, where the facts are so remote in point of time, and must be so various in point of force and bearing. It cannot be presumed that Congress were insensible of these considerations, or intended to deprive the Secretary of the Treasury of the fullest use of the best means to accomplish the end, viz., to suppress frauds, and to ascertain, and allow just claims." (U. S. v. Bailey, 9 Pet., 253.)

This process of reasoning gives to the Secretary of the Treasury and to the Attorney-General authority, by regulation, to authorize a circuit court commissioner to administer oaths in support of claims against the United States. But no such regulation has been prescribed. The usage of the Treasury Department, to receive affidavits sworn to by commissioners in support of claims against the United States, has been so long continued that it has become national executive common law, if such usage can become so. Section 627 of the Revised Statutes declares that the commissioners "shall exercise the powers which are or may be expressly conferred by law upon commissioners * * *." It may be that this expression, "expressly conferred by law," would generally mean, conferred by act of Congress, though an authorized regulation of the head of a Department has the force of law. This expression is not found in any act of Congress, until incorporated in the Revised Statutes. There are numerous sections of the Revised Statutes defining the powers and prescribing the duties of commissioners. Revised Statutes, 627, 628, 727, 728, 945, 1014, 1042, 1778, 1878, 1982-1987, 3479, 4079-4081, 5270, 5271, 5296, and the act of June 23, 1874 (18 Stat., 255, sec. 6.) See and compare 1778 with 1878, 2181. These sections have been taken from many statutes passed at different times. Generally, such sections of the Revised Statutes would be construed *in pari materia*, as parts of one act. On this theory, full effect would be given to all the words of section 627. But it is now well settled that, in construing the Revised Statutes, when their meaning is not plain, reference may be had to the original statutes from which they were taken. (United States

v. Bowen, 100 U. S., 513; *Arthur v. Dodge*, 101 U. S., 36; *Meyer v. Car Co.*, 102 U. S., 11.) And, as no statute, prior to the revision, declared that commissioners should only exercise the powers "expressly conferred by law," and as this expression is only found in section 627, in which it is an interpolation not warranted by any previous statute, it is regarded as only meaning that commissioners shall exercise such powers as may be authorized by statute. And the powers expressly authorized by statute carry with them other powers not expressly authorized—implied or incidental powers—being those necessary and proper as means of carrying into effect powers expressly given. It is evident that nearly every one of the separate acts of Congress has been passed on the theory that powers expressly given carried with them other and incidental powers. An examination of the acts will show that without such implied powers it would be utterly impossible for commissioners to exercise the jurisdiction expressly given them by statute. The commissioners can therefore exercise such incidental or implied powers as are necessary means appropriate to the exercise of their jurisdiction expressly given. And, upon the authority of *United States v. Bailey* (9 Pet., 254), they may exercise such powers as may be conferred upon them by authorized regulations of the head of an executive department, or Comptroller, or by usage equivalent to a regulation and having the force of law. The usage of recognizing the validity of oaths administered by commissioners, and of affidavits taken before them in support of claims against the United States, has been so long continued that it is national executive common law, known to and recognized by Congress by appropriations and otherwise, and so is subject to the sanction of penal legislation. A construction which would now nullify this usage would be productive of ruinous consequences. Circuit court commissioners are, by force of national executive common law, authorized to administer oaths and certify affidavits in support of claims against the United States. Even if commissioners can only exercise such powers as are "expressly conferred by law" [statute] they can administer such oaths. The Revised Statutes provide:

"SEC. 1778. In all cases in which, under the laws of the United States, oaths or acknowledgments may now be taken or made before any justice of the peace of any State or Territory, or in the District of Columbia, they may hereafter be also taken or made by or before any notary public duly appointed in any State, district, or Territory, or any of the commissioners of the circuit courts, and, when certified under the hand and official seal of such notary or commissioner, shall have the same force and effect as if taken or made by or before such justice of the peace."

No act of Congress gives a justice of the peace of a State authority to administer oaths in support of claims against the United States. But such justice has, at common law, *ex virtute officii*, authority to administer oaths generally. This authority pertains to the judicial office. And in our duplex system of government, this authority of a State justice

extends to oaths administered for purposes of the national government. This is settled national executive common law. It is a part of our inter-State law. Or, it may be said with more accuracy, that it is a part of that system treated of under the title of the "Conflict of Laws," and especially that portion of it which pertains to the relations between the national government and the States. (United States v. Bailey, 9 Pet., 249, 255; Bishop Crim. Law, 3 Ed., 987; United States v. Winchester, 2 McLean, 135; Orr v. Lacy, 4 McLean, 243; Rump v. Commonwealth, 30 Pa. St., 475; People v. Sweetman, 3 Parker 358; Walch v. Dart, 12 Wis., 635; Rorer on Inter-State Law, 119; Wharton, Conflict Laws, secs. 699, 700, 759; McAfee v. Doremus *et al.*, 5 How., 53; Bank of Rochester v. Gray, 2 Hill, N. Y., 227; Ray v. Porter, 42 Ala., 327.) And the effect of section 1778 of the Revised Statutes is that if justices of the peace in any Territory or in the District of Columbia may administer oaths generally, every commissioner wherever located shall have the same power.

The Revised Statutes relating to justices of the peace in the District of Columbia provide that—

"They shall have all the powers vested in, and perform all the duties required of, justices of the peace, as individual magistrates, by the laws in force within the District." (Rev. Stat., Dist. Col., sec. 995.)

The "laws in force within the District" give justices authority to administer oaths generally. This is a part of their common law powers, and the Maryland statute of November, 1796, prescribes the fee therefor. (2 Kilty's Laws of Maryland, Ch. XLIII, sec. XXXI; act of 1801, Chap. 74; 1 Dorsey's Laws, Part 2, pp. 461, 463, secs. 30-32.) The right to charge fees therefor is recognized by the act of Congress, July 16, 1790 (1 Stat., 130), and the act of Feb. 27, 1801 (2 Stat., 107, section 14). And, under territorial statutes, justices of the peace in the Territories are generally invested with authority to administer oaths. (Rev. Stat., 1856, 1857, 1878, 1907, 1926, 1927, 2181.)

The act of August 15, 1876 (19 Stat., 206, chap. 304), provides that:—

"Notaries public of the several States, Territories, and the District of Columbia be, and they are hereby, authorized to take depositions, and do all other acts in relation to taking testimony to be used in the courts of the United States, *take acknowledgments and affidavits*, in the same manner and with the same effect as commissioners of the United States circuit court *may now lawfully take or do.*"

Here express authority is given to notaries public to "take acknowledgments and affidavits in the same manner and with the same effect as commissioners * * * may now take or do."

It is evident that Congress supposed that commissioners could take affidavits at least in the cases sanctioned by the usages stated. This act is a distinct recognition of such authority. And, on the principle decided in Bliss's case, *ante*, 38, this is equivalent to a legislative grant of the power. In addition to this, Congress may be supposed to have legislated in view of the universal usage which recognized the authority

of commissioners to administer oaths in support of claims against the United States, and in other cases in which they have generally exercised such power. It may be said now as it was said in the case of the United States *v.* Bailey, *supra*, "Congress must be presumed to have legislated under this known state of the laws and the usage."

In Muirhead's case (13 Ct. Cl., 256) it was said that a commissioner "had power to administer oaths" to "supervisors" of elections and "special deputy marshals" (Rev. Stat., 1756, 2012, 2021, 2026).

No statute or authority is cited in support of this allegation.

There is another view which will now be presented. Section 627 of the Revised Statutes provides that circuit court commissioners "shall exercise the powers which *are* or may be expressly conferred by law * * *." The Revised Statutes contain "the statutes of the United States, in force on the first day of December, anno Domini one thousand eight hundred and seventy-three." (Rev. Stat., Title of Act, and sec. 5595, page 1085.) They were designed to present the statute law as it then existed. There are many instances, in the Revision, in which reference is made to other statutes not incorporated therein, and these must be examined to ascertain the effect of those found therein. The authority for doing this is well established. Thus, it is said:

"If one statute refers to another for the powers given by the former, the statute referred to is to be considered as incorporated in the one making the reference. *Turney v. Wilton*, 36 Ill., 385. Thus, where certain proceedings of a water-works company were to be conducted according to an act of 1853 relating to railroad companies, and the act of 1853 was afterwards repealed and another act was substituted in its place, it was held that the act of 1853 remained in force so far as incorporated by reference into the water company's act. *Spring, &c., Works v. San Francisco*, 22 Cal., 434; *Sika v. Chicago, &c., R. R.*, 21 Wisc., 370. A statute regulating procedure, and referred to as the rule for another case, is to govern as subsequently modified from time to time. *Kugler's Appeal*, 55 Penn. St., 123. Where an action given by a statute is by a subsequent statute extended to another case, everything annexed to the action by the first statute is included, and applies to that other case. *Baltimore, &c., R. R. v. Wilson*, 2 W. Va., 528." (Sedgwick Construction Stat. and Const. L., 2d Ed., 229.)*

In the light of these principles, the inquiry is now to be made: what are the powers expressly conferred by law, as they existed at the date

* For acts relating to commissioners, see: Act June 9, 1794 (1 Stat., 395, sec. 1); Act February 20, 1812 (2 Stat., 679, secs. 1, 2); Act March 1, 1817 (3 Stat., 350); Act August 23, 1842 (5 Stat., 516, sec. 1); Act August 8, 1846 (9 Stat., 79); Act September 18, 1850 (9 Stat., 462, secs. 1, 2, 3, 4); Act February 24, 1855 (10 Stat., 614); Act March 2, 1855 (10 Stat., 630, sec. 2); Act August 16, 1856 (11 Stat., 50, sec. 13); Act January 24, 1857 (4 Stat., 197); Act July 28, 1866 (14 Stat., 343); and see *Whitney v. Hunt*, 5 Cranch C. C., 120; *Gray, etc. v. Tunstall, Hempstead*, 558; *United States v. Hand et al.*, 6 McLean, 274; *United States v. Rundlett*, 2 Curt., 41; *Kief, etc., v. The Steamer London*, 6 McLean, 184; *Ex parte Crandall*, 2 Cal., 144; *The Fugitive Slave Law*, 1 Blatchf., 635; *Case of Henry Long*, 3 Am. L. J., 294; *Sim's 4 Law Rep.*, 17; *Prigg v. Pennsylvania*, 16 Pet., 539; *United States v. Stowell*, 2 Curt., 153; 4 Op. Att.-Gen., 233; 6 Op. Att.-Gen., 148; *Id.*, 239.

of the Revision? The act of February 20, 1812 (2 Stat., 679), is as follows:

CHAP. XXV.—AN ACT for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall be lawful for the circuit court of the United States, to be holden in any district in which the present provision, by law, for taking bail and affidavits in civil causes, (in cases where such affidavits are, by law, admissible) is inadequate, or on account of the extent of such district, inconvenient, to appoint such and so many discreet persons, in different parts of the district, as such court shall deem necessary, to take acknowledgments of bail and affidavits; which acknowledgments of bail and affidavits shall have the like force and effect as if taken before any judge of said court; and any person swearing falsely in and by any such affidavit, shall be liable to the same punishment as if the same affidavit had been made or taken before a judge of said court * * *."

The marginal notes and the "reference index" to the second edition of the Revised Statutes recognize this as incorporated in section 627. But, if these cannot be looked to in construing this section, this act of 1812 was a law in force on the first day of December, 1873, and hence is a "reference statute" to be examined to ascertain the powers expressly conferred by law on commissioners. Here the power is expressly given to take affidavits, at least in civil causes.

The act of March 1, 1817 (3 Stat., 350) provides:

"That the commissioners who now are, or hereafter may be, appointed by virtue of the act, entitled 'An act for the more convenient taking of affidavits and bail in civil causes, depending in the courts of the United States,' are hereby authorized to take affidavits and bail in civil causes, to be used in the several district courts of the United States, and shall and may exercise all the powers that a justice or judge of any of the courts of the United States may exercise by virtue of the thirtieth section of the act, entitled 'An act to establish the judicial courts of the United States.'"

The thirtieth section of the act of September 24, 1789 (1 Stat., 88) provides that in certain specified cases depositions may be taken "before any justice or judge of any of the courts of the United States * * * or judge of a county court or court of common pleas of any of the United States * * *."

Under these statutes, the usage has been that affidavits were made before commissioners.

Thus, by a reasonable construction of the statutes mentioned, and the usage thereunder, commissioners are expressly authorized by law to take affidavits.

The Revised Statutes contain a section, mainly taken from the Act of February 26, 1853 (10 Stat., 167, a part of sec. 3), prescribing the fees of commissioners as follows:

COMMISSIONERS' FEES.

SEC. 847. For administering an oath, ten cents.

For taking an acknowledgment, twenty-five cents.

For hearing and deciding on criminal charges, five dollars a day for the time necessarily employed.

For attending to a reference in a litigated matter, in a civil cause at law, in equity, or in admiralty, in pursuance of an order of the court, three dollars a day.

For taking and certifying depositions to file, twenty cents for each folio.

For each copy of the same furnished to a party on request, ten cents for each folio.

For issuing any warrant or writ, and for any other service, the same compensation as is allowed to clerks for like services.

For issuing any warrant under the tenth article of the treaty of August nine, one thousand eight hundred and forty-two, between the United States and the Queen of the United Kingdom of Great Britain and Ireland, against any person charged with any crime or offense set forth in said article, two dollars.

For issuing any warrant under the provision of the convention for the surrender of criminals, between the United States and the King of the French, concluded at Washington November nine, one thousand eight hundred and forty-three, two dollars.

For hearing and deciding upon the case of any person charged with any crime or offense, and arrested under the provisions of said treaty, or of said convention, five dollars a day for the time necessarily employed.

For the examination and certificate in cases of applications for discharge of poor convicts imprisoned for non-payment of a fine or fine and costs, five dollars a day for the time necessarily employed.

See also Rev. Stat., sec. 1042, and act June 1, 1872, sec. 16 (17 Stat., 199).

This recognizes the authority of commissioners to administer oaths, and though this would only mean in the cases where such oaths are authorized, yet it seems to recognize a usage to administer oaths generally.

It is held in this case that the affidavits made before the commissioner are valid, and the fees charged are legally authorized. They will be paid accordingly.*

TREASURY DEPARTMENT,

First Comptroller's Office, July 31, 1884.

* The Register of the Department of Justice for 1883 (pp. 202-205), under the CAPTION of "REGULATIONS PRESCRIBED BY THE ACCOUNTING OFFICERS OF THE TREASURY DEPARTMENT"—"UNITED STATES COMMISSIONERS"—contains the following:

"Accounts must be rendered quarterly or half-yearly. If rendered for fractions of quarters, they will be held up for settlement until the expiration of such quarter.

The fees in any one case must not be divided between two accounts, but should be included in the account for the quarter in which the process was returned or hearing had.

Where a preliminary hearing is held the latter part of a quarter or fiscal year, and the final examination the beginning of the following quarter or fiscal year, all the fees in the case must be charged in the account for the quarter or half year in which the final examination is held.

Commissioners will verify their accounts in the following form:

I, A. B., a United States Commissioner for the ——— district of ———, being duly sworn, depose and say that the fees charged in the foregoing account, amounting to the sum of ——— dollars, are just and true as therein stated, and that no part of the

same have been received by me, and that the services therein charged have been actually and necessarily performed as therein stated.

A. B.,
United States Commissioner.

Sworn to and subscribed before me this — day of —, 188—.

When several complaints are made at one time against a person for different offenses, only one warrant should be issued for his arrest. If other warrants be found necessary they can be issued when defendant is before the Commissioner.

Accounts should be indorsed as follows:

Statement of account
of
A — B —,
United States Commissioner
for
— district of —.
Post-office address,
—, —.

No charges can be made for swearing defendants' witnesses or issuing subpoenas for them.

On the termination of each case the Commissioner will tax upon the warrant the fees of Marshal or Deputy serving the process in the case; and where the rules of court require copies of process to be returned in lieu of originals, the costs must be indorsed on the copies.

Where a Commissioner issues process to be returned before some other Commissioner, the statement of such fact must appear in the account wherein the fees for issuing process are charged, and the Commissioner hearing the case will state the name of the person who issued the process.

Where a hearing is had under section No. 1042 Revised Statutes, the Commissioner will charge but \$5 per day for his services, no other fees being authorized.

When a case is necessarily continued for further examination, and the defendant is committed or bailed, no more than one mittimus or recognizance is necessary pending the examination. No per diem fee is chargeable for a day when there is neither hearing nor deciding on a criminal charge, as when, by request of the District Attorney or defendant, a continuance is granted without other proceedings.

A witness subpoenaed in several cases at the same time is entitled to but one mileage for travel, and for attendance to one per diem each day."

The Register also contains a "FORM OF COMMISSIONER'S ACCOUNT FOR FEES" which is now revised as follows:—

FORM FOR COMMISSIONER'S ACCOUNT FOR FEES IN CRIMINAL CASES.

THE UNITED STATES }
vs. } Charge.

(Date)	Drawing complaint, 2 folios, at 15 cents each, ...	20
	[The complaint may include more or less than two folios, and fees should be taxed accordingly.]	
	Oath to complaint, ...	10
	Filing complaint, ...	10
(Date)	Issuing warrant, ...	1 00
(Date)	Entering return of warrant, * [see explanation, <i>post</i>], ...	15
	Filing warrant, ...	10
	Issuing subpoena, ...	25
	Entering return of subpoena, * [see explanation, <i>post</i>], ...	15
	Filing subpoena, ...	10

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(Date)	Administering oaths to 2 witnesses for United States, ...	20
	Issuing warrant, temporary commitment, ...	1 00
	Entering return of temporary warrant of commitment,* [see explanation, <i>post</i>],.....	15
	Filing warrant of commitment, ...	10
(Date)	Drawing bond for appearance of defendant for examination, with two sureties, two folios, at 15 cents each, .	30
	Taking two acknowledgments, at 25 cents each,.....	50
	Drawing two affidavits of justification, one folio each, at 15 cents per folio. [This will only be allowed when actually necessary.].....	30
	Two oaths to affidavit of justification, 10 cents each, ...	20
	Issuing warrant for appearance at court, ...	1 00
	Entering return of warrant,* [see explanation, <i>post</i>], ...	15
	Filing warrant, ...	10
	Drawing bond for appearance at court, 3 folios, at 15 cents per folio, .	45
	Taking acknowledgement of principal, ...	25
	Taking acknowledgment of 2 sureties, at 25 cents each, ...	50
	Drawing justification of 2 sureties, one folio each, at 15 cents per folio, .	30
	Administering oaths to 2 sureties, at 10 cents each, ...	20
	Drawing recognizances of 2 witnesses, 2 folios each, at 15 cents per folio, .	60
	Taking acknowledgment of 2 witnesses, 25 cents each, ...	50
	Two oaths to witnesses as to mileage and attendance, 10 cents each...	20
	Drawing order to pay witnesses, 1 folio, at 15 cents,.....	15
	Copy for marshal, 1 folio,.....	10
(Date)	Hearing and deciding case.....	5 00
	Copy of process for court, 6 folios, at 10 cents each, ...	60
	Making docket entries,* as required by order of court, 15 cents per folio. [The separate entries are not to be charged by folios, but the entire record is to be computed in folios.]	
	For copy of the same transmitted to clerk of court, 10 cents per folio.	
	Total	

* In those districts in which the court has made an order requiring a transcript of docket entries to be sent to the clerk thereof, the charge for "making docket entries" will include the fees before enumerated for "entering returns," &c., in the several cases before specified.

The question whether every Commissioner, without an order of court requiring it, "should keep, in a record or docket, a brief statement of his proceedings" in criminal cases, is perhaps not finally decided. (Rand's case, 4 Lawrence, Compt. Dec., 394: Wells's case, *Id.*, 403.)

Where such record is kept, the returns on process and the "order to pay witnesses" should be entered thereon, and the charges above mentioned for such entries should not be made separately as specified in the foregoing "account for fees," but will be covered by the fee for making docket entries, which is simply the record or statement of proceedings. The entries should, however, all be specified in the charge for docket entries.

The per diem fee prescribed "for hearing and deciding criminal charges" is not allowable for any day when the accused is not before the Commissioner for examination, nor for any day when the proceedings do not constitute a hearing as to the probable guilt of the accused. For example, if the only point considered is whether the hearing shall be postponed to a future day, there is not a hearing and deciding of criminal charges.

When two or more examinations of one or more defendants take place on one day, only one per diem fee is chargeable.

In every instance where a per diem fee is charged, the account should show what was done on the day for which the fee is claimed.

IN THE MATTER OF THE RIGHT OF THE CREEK NATION OF INDIANS.
 UNDER THE TREATY OF AUGUST 28, 1856 (11 STAT., 700), AND SECTION
 2094 OF THE REVISED STATUTES, TO BE PAID "FOR ASSISTANCE IN
 AGRICULTURE," "FOR EDUCATION," AND "FOR SERVICES OF A WAGON
 MAKER, BLACKSMITH AND ASSISTANT, SHOP AND TOOLS, IRON AND
 STEEL".—CREEK INDIAN CASE.

-
1. Construction given to the Revised Statutes, sections 2093, 2094, 2095.
 2. Construction of part of Article V, of the Creek treaty of August 28, 1856 (11 Stat., 700).
 3. Under section 2093 of the Revised Statutes, the whole proceeds of the sale of the lands to which it refers are to be paid into the Treasury of the United States.
 4. Section 2094 of the Revised Statutes makes a permanent specific appropriation of all sums that are or may be required to be advanced, paid or invested, by virtue of section 2093 of the Revised Statutes.
 5. The only sums to be advanced, paid or invested, by virtue of said section, are such as are given by treaty as a consideration for the cession of lands by Indians.
 6. There is no appropriation for the benefit of the Creek Nation of Indians, "for assistance in agriculture," "for education," or "for services of a wagon maker," etc.
 7. When the estimates of appropriation, transmitted through the Secretary of the Treasury to Congress, include an item for the benefit of Indians, which by treaty depends upon "the pleasure of the President," it is to be presumed that the President has signified his pleasure that such estimate should be submitted to Congress.
 8. But such estimates are not evidence that the President has signified his pleasure that the accounting officers of the Treasury Department shall allow a claim to be paid by warrant.
 9. As the First Comptroller is required to countersign only those Treasury warrants which "shall be warranted by law," he must judge and decide whether a balance, certified by the Second Comptroller, is (1) authorized by law, and (2) whether there is an appropriation for the payment thereof.

July 14, 1884, the Second Auditor addressed a letter to the Secretary of the Treasury, inviting his attention to the claim of the Creek Nation of Indians for \$19,740, under article V of the treaty of August 28, 1856 (11 Stat., 700), etc. The letter says:

"That article provides that in return for the relinquishment of certain lands, the Creeks are to receive certain sums of money, including the following amounts payable *per annum*, 'during the pleasure of the President' (1) *two thousand dollars for assistance in agriculture* (2) *one thousand dollars for education* (3) *one thousand seven hundred and ten dollars for services of a wagon-maker, blacksmith and assistant, shop and tools, iron and steel*—in all, \$4710 annually.

"This claim is stated by the Indian Office for the amounts of the above-named items, which have, from time to time, been embraced in the estimates submitted to Congress, on the theory that such submission, being substantially an executive recommendation, is tantamount to an expression of 'the pleasure of the President' that such sums be paid; and that, notwithstanding the failure of Congress to act favora-

bly by making the specific appropriation asked for, the Secretary of the Treasury is empowered, under sections 2093 and 2094, Revised Statutes, to issue a warrant for the amounts estimated.

"It is desirable, before acting on this claim, to obtain an authoritative decision on the main points involved, to wit:

"1st. Whether the favorable 'pleasure of the President' is sufficiently expressed by the embodiment, in official estimates submitted to Congress, of items made dependent on the executive pleasure by the terms of treaty;

"2d. Whether the provision of section 2094, Revised Statutes, that all sums required to be paid for Indian lands by treaties, 'are appropriated in conformity to them, and shall be drawn from the Treasury as other public moneys are drawn therefrom, under such instructions as may from time to time be given by the President,' is sufficient authority for the issue of a warrant in the present case, for payment of the sum claimed, from the appropriation, 'Fulfilling Treaty with Creeks.'

"It is respectfully requested, therefore, that the subject be referred to the First Comptroller for his opinion on the points involved.

The account, as stated by the Acting Commissioner of Indian Affairs, is, in part, as follows:

The United States to Creek Nation, Dr.

1884.

May 26. To the following sums, stipulated to be paid during the *pleasure* of the *President*, to the Creek Nation, under the 8th article of the treaty of Jan'y 24, 1826,* (7 Stat., 287) 5th article of the treaty of Feb'y 14, 1883, (7 Stat., 419) and 5th article of treaty dated August 7, 1856, (11 Stat., 700) reported to Congress for appropriation by the President, through the Secretary of the Treasury, in Books of Estimates for the fiscal years, 1875, 1876, 1877, 1879, 1883 and 1884, not appropriated by Congress, but subject to allowance and payment under sections 2093, and 2094, Revised Statutes.

The amounts to be paid, during the pleasure of the President, are specified in the 5th article of the treaty of 1856, and are as follows:



Blacksmith and assistant, and for shop and tools.....	\$840 00
Iron and steel for shop	270 00
Wagon maker	600 00
Assistance in agriculture	2,000 00
Education	1,000 00
Total.....	<u>4,710⁰⁰</u>

The account then gives items for the period, 1875 to 1884 inclusive, and the aggregate thereof.

July 16, 1884, this letter and account were referred by the Chief Clerk in the office of the Secretary to the First Comptroller, "for his opinion on the question • • • submitted.

* NOTE:—This should be, Aug. 28. Treaties are of effect only as from the date of their proclamation. (Wheaton, Internat. L., §§ 264, 546.)

OPINION BY WILLIAM LAWRENCE, *First Comptroller.*

Treaties have been made with the Creek Nation, August 7, 1790 (7 Stat., 35); June 16, 1802 (*Id.*, 68); February 12, 1825 (*Id.*, 237); January 24, 1826 (*Id.*, 286); February 14, 1833 (*Id.*, 417); January 4, 1845 (9 Stat., 821); August 28, 1856 (11 Stat., 699). Some of the chiefs were dissatisfied with the treaty of 1825, and war was imminent. To avoid this, a number of the prominent chiefs were brought to Washington, and, on January 24, 1826, the treaty of 1825 was annulled and a new one entered into. Article eight of the treaty of 1826 (7 Stat., 287) provides that a blacksmith and a wheelwright and such assistance in agriculture as the President may think proper shall be furnished. A subsequent treaty was made at Fort Gibson, February 14, 1833 (7 Stat., 417) by article five of which, "as an evidence of * * * kind feeling * * *," the United States promised to furnish one blacksmith and one wheelwright or wagon maker in addition to those already employed, and to bestow other enumerated benefits under the direction of the President, to be continued as long as he found them conducive to the welfare of the Creek Nation. These items were intended as gratuities in the nature of rewards of merit for good conduct. Prior to the treaty of 1856, the amounts that might thus be given for the various purposes were left in doubt. One of the objects of article five of the treaty of 1856, was to fix these amounts.

The treaty of 1856 (11 Stat., 700, 701) contains the following provisions:

"ARTICLE V. The Creek Indians do hereby, absolutely and forever, quitclaim and relinquish to the United States all their right, title, and interest in and to any lands heretofore owned or claimed by them, whether east or west of the Mississippi River, and any and all claim for or on account of any such lands, except those embraced within the boundaries described in the second article of this agreement; and it doth also, in like manner, release and fully discharge the United States from all other claims and demands whatsoever, which the Creek Nation or any individuals thereof may now have against the United States, excepting only such as are particularly or in terms provided for and secured to them by the provisions of existing treaties and laws; and which are as follows, viz: permanent annuities in money amounting to twenty-four thousand five hundred dollars, secured to them by the fourth article of the treaty of seventh August, seventeen hundred and ninety, the second article of the treaty of June sixteenth, eighteen hundred and two, and the fourth article of the treaty of January twenty-fourth, eighteen hundred and twenty-six; permanent provision for a wheelwright, for a blacksmith and assistant; blacksmith shop and tools, and for iron and steel under the eighth article of the last-mentioned treaty; and costing annually one thousand seven hundred and ten dollars; *two thousand dollars per annum, during the pleasure of the President, for assistance in agricultural operations under the same treaty and article; six thousand dollars per annum for education for seven years, in addition to the estimate for present fiscal year, under the fourth article of the treaty of January fourth, eighteen hundred and forty-five; one thousand dollars*

per annum during the pleasure of the President, for the same object, under the fifth article of the treaty of February fourteenth, eighteen hundred and thirty-three; services of a wagon maker, blacksmith and assistant, shop and tools, iron and steel, during the pleasure of the President, under the same treaty and article, and costing one thousand seven hundred and ten dollars annually; the last instalment of two thousand two hundred and twenty dollars for two blacksmiths and assistants, shops and tools, and iron and steel, under the thirteenth article of the treaty of March twenty-fourth, eighteen hundred and thirty-two, and which last it is hereby stipulated shall be continued for seven additional years. * * *

"ARTICLE VI. In consideration of the foregoing quitclaim, relinquishment, release, and discharge, and of the cession of a country for the Seminole Indians contained in the first article of this agreement, the United States do hereby agree and stipulate to allow and pay the Creek Nation the sum of one million of dollars, which shall be invested and paid as follows, viz :"

The remainder of the article describes the time and mode of investment and payment.

The provisions of the Revised Statutes are, as follow :

"SEC. 2093. All moneys received from the sales of lands that have been, or may be hereafter, ceded to the United States by Indian tribes, by treaties providing for the investment or payment to the Indians, parties thereto, of the proceeds of the lands ceded by them, respectively, after deducting the expenses of survey and sale, any sums stipulated to be advanced, and the expenses of fulfilling any engagements contained therein, shall be paid into the Treasury in the same manner that moneys received from the sales of public lands are paid into the Treasury.

"SEC. 2094. All sums that are or may be required to be paid, and all moneys that are or may be required to be invested by the treaties mentioned in the preceding section, are appropriated in conformity to them, and shall be drawn from the Treasury as other public moneys are drawn therefrom, under such instructions as may from time to time be given by the President.

"SEC. 2095. All investments of stock, that are or may be required by treaties with the Indians, shall be made under the direction of the President; and special accounts of the funds under such treaties shall be kept at the Treasury, and statements thereof be annually laid before Congress."

With these treaty and statutory provisions in view, the questions submitted for an opinion may be now considered. Section 2093 of the Revised Statutes relates to Indian treaties, which—

I. Cede lands to the United States, and,

II. Provide for (1) the investment or (2) payment to the Indians of the proceeds of the lands, *after deducting* :

1. The expenses of survey and sale;
2. Any sums stipulated to be advanced;
3. And after deducting the expenses of fulfilling any engagements contained in the treaty.

This section requires that, after deducting the three above-named

classes of expenditure from them, the proceeds of ceded lands must be paid into the Treasury. Literally, this section might mean that only the *residue*, after making the deductions, is to be paid into the Treasury. But, in practice, the entire proceeds are paid into the Treasury as a fund, and it is charged with the three classes of expenditures mentioned, and with moneys drawn from it to be *invested* for or *paid* to any Indian tribe. The Constitution provides that:

"No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." (Const., Art. I, sec. 9, cl. 7.)

In view of this, section 2094 makes a permanent specific appropriation of "*all sums that are or may be required to be paid,*" and also of "*all moneys that are or may be required to be invested by the treaties mentioned in the preceding section.*" The appropriation thus made of *all moneys* so required, shows that *all* proceeds of sales must be paid into the Treasury without first making any deductions. Some of the treaties provide for *advances of money* to Indians before any sales of lands, and some also provide for furnishing supplies and services to them, as part consideration for cessions of land and to be reimbursed from proceeds of sales. Section 2094 appropriates the money to make said advances and to pay for such services and supplies. Literally, this section appropriates money to pay "*all sums that are or may be required to be paid * * * by the treaties mentioned in the preceding section * * *,*" whether as a consideration for ceding lands in trust for sale, or to be paid either *for other consideration or reason*, or even as a gratuity. But the section does not make any appropriation, except such as is to be reimbursed from proceeds of sales of ceded lands. The above analysis of section 2093 shows that it contemplates a re-imbursement of the United States from the proceeds of the sales of ceded lands, and hence it relates only to advances or payments made by the Government *as a consideration for the cession*. And section 2095 recognizes this view, by requiring "*special accounts of the funds under such treaties,*" to be kept and statements thereof to be annually laid before Congress. These sections are all to be construed together, and the words of each to be limited to and restrained by the objects apparent in all. It is manifest that the three items, which make up the gross sum of the claim in this case, are not, in whole or in any part, a consideration for the cession of lands by the Creek Indians. They are *recognized* in the treaty of 1856, as accruing under other and prior treaties, but not as a consideration for cessions. This has been so well understood that no sum on account of any of these items has ever been paid by virtue of section 2094 of the Revised Statutes, no charge has ever been made against the fund arising from the proceeds of Creek ceded lands on account of payments for such items, and, so far as they have been made, payments have been

under specific appropriations in Indian appropriation acts, based on estimates transmitted to Congress asking for them.*

The Revised Statutes provide :

"SEC. 3660. The heads of Departments, in communicating estimates of expenditures and appropriations to Congress, or to any of the committees thereof, shall specify, as nearly as may be convenient, the sources from which such estimates are derived, and the calculations upon which they are founded, and shall discriminate between such estimates as are conjectural in their character and such as are framed upon actual information and applications from disbursing officers. They shall also give references to any law or treaty by which the proposed expenditures are, respectively, authorized, specifying the date of each, and the volume and page of the Statutes at Large, or of the Revised Statutes, as the case may be, and the section of the act in which the authority is to be found.

"SEC. 3669. All annual estimates for the public service shall be submitted to Congress through the Secretary of the Treasury, and shall be included in the book of estimates prepared under his direction."

(See Revised Statutes, 3660-3686.)

When the Book of Estimates includes an item for the benefit of Indians, depending upon "the pleasure of the President," it is to be presumed that the President has signified his pleasure that an appropriation should be asked to provide for it. (Seward's case, 2 Lawrence, Compt. Dec., 2d ed., 57, and cases cited.) The estimates signify the President's approval only *to the extent of asking an appropriation from Congress*. This lays no foundation for the allowance of a claim by accounting officers. The estimates are not evidence in support of a claim on which accounting officers are required to act. They have another distinct and specific object, in no way connected with the allowance of such claim by said officers. When Congress refuses such an appropriation, it seems reasonable that no officer is required to make any further request on the subject, or take any further action in relation to it. (Mississippi Central Railroad Co's case, 4 Lawrence, Compt. Dec., 553, 572.)

The Second Comptroller has jurisdiction of claims of this character to the extent of certifying balances thereon, and as to that the First Comptroller has no jurisdiction. (Rev. Stat., 273, paragraph second.) But the Second Comptroller is charged with no duty or authority as to Treasury warrants to pay any claim. The Secretary of the Treasury grants all such warrants (Rev. Stat., 248), and it is made the duty of the First Comptroller "to countersign all warrants drawn by the Secretary of the Treasury, *which shall be warranted by law*." (Rev. Stat., 269, paragraph third.) Before the Comptroller can lawfully countersign a warrant, he is required in the exercise of a *quasi* judicial authority to decide whether it is warranted by law. (Bender's case, 1 Lawrence, Compt. Dec., 2d ed., 397; *Id.*, App., Ch. xii, 549.)

* See Act of June 22, 1874, 18 Stat., 154; March 3, 1875, *Id.*, 428; Aug. 15, 1876, 19 Stat., 181; March 3, 1877, *Id.*, 276; May 23, 1878, 20 Stat., 69; Feb'y 17, 1879, *Id.*, 300; May 11, 1880, 21 Stat., 119; March 3, 1881, *Id.*, 489.

If (1) there be no law authorizing a claim to be allowed and a balance certified thereon by the Second Comptroller, or (2) if there be no appropriation to pay any balance so certified, the First Comptroller must so decide and refuse to countersign any warrant for the payment thereof. Of course, the Secretary of the Treasury would not grant a warrant for the payment of a claim for the satisfaction of which no appropriation exists.

There is no legal claim in this case against the United States. The President has not signified his pleasure in favor of such claim for the purpose of its allowance by accounting officers. Hence, there is no authority for any allowance by them. There is no appropriation for the payment of such claim.

The Secretary of the Treasury will be advised accordingly.

TREASURY DEPARTMENT,

First Comptroller's Office, August 5, 1884.

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IN THE MATTER OF THE RIGHT OF A CLERK OF A CIRCUIT COURT OF
THE UNITED STATES TO COMPENSATION FOR SERVICES UNDER SECTION
2 OF THE ACT OF JUNE 30, 1879 (21 STAT., 43).—JURY-SELECTION CASE.

1. A Clerk of a Circuit Court of the United States is not entitled to compensation for services under section 2 of the act of June 30, 1879 (21 Stat., 43).
2. Such Clerk is not a Jury-Commissioner under said act.
3. Section 2 of the act of June 30, 1879 (21 Stat., 43), imposes the duties therein required of Clerks of the Circuit and District Courts of the United States on them as a part of their official duties as such, with no compensation attached.
4. Congress has authority to require new and additional duties of every officer, not inconsistent with the functions of his office as legislative, executive, or judicial in character.
5. The effect of section 1765 of the Revised Statutes considered, with reference to allowing compensation to a Clerk of a United States Court under section 2 of the act of June 30, 1879 (21 Stat., 43).

The act of June 30, 1879 (21 Stat., 43, sec. 2), makes provision for the selection of jurors for the Courts of the United States, as follows:—

“That all such jurors, grand and petit, including those summoned during the session of the court, shall be publicly drawn from a box containing, at the time of each drawing, the names of not less than three hundred persons, possessing the qualifications prescribed in section eight hundred of the Revised Statutes, which names shall have been placed therein by the clerk of such court and a commissioner, to be appointed by the judge thereof, which commissioner shall be a citizen of good standing, residing in the district in which such court is held, and a well-known member of the principal political party in the district in which the court is held opposing that to which the clerk may belong. the clerk and said commissioner each to place one name in said box alternately, without reference to party affiliations, until the whole number required shall be placed therein. * * *

Said act (21 Stat., 44, sec. 3), further provides:—

“That the Attorney-General shall include in his annual report a statement of all payments or expenditures during any fiscal year out of any appropriation fund subject to requisitions by him.”

The act of March 3, 1883 (22 Stat., 630, 631), “making appropriations for sundry civil expenses of the government for the fiscal year ending June thirtieth, eighteen hundred and eighty-four,” contains, under the caption, “JUDICIAL—UNITED STATES COURTS,” one clause, as follows:—

“For fees and expenses of bailiffs; furniture; for payment of expenses of district judges who may be sent out of their districts, in pursuance of law, to hold a circuit or district court; and other miscellaneous expenses, three hundred and ten thousand dollars.”

The Revised Statutes contain the following provisions:—

“SEC. 363. The Attorney-General shall, whenever in his opinion the public interest requires it, employ and retain, in the name of the United States, such attorneys and counselors at law as he may think necessary to assist the district attorneys in the discharge of their duties, and shall stipulate with such assistant attorneys and counsel the amount of compensation, and shall have supervision of their conduct and proceedings.

• • • • •
“SEC. 368. The Attorney-General shall exercise general supervisory powers over the accounts of district attorneys, marshals, clerks, and other officers of the courts of the United States.

“SEC. 369. The Attorney-General shall sign all requisitions for the advance or payment of moneys appropriated for the Department of Justice, out of the Treasury, subject to the same control as is exercised on like estimates or accounts by the First Auditor or First Comptroller of the Treasury.

• • • • •
“SEC. 384. It shall be the duty of the Attorney-General to make to Congress, at the commencement of each regular session, a report of the business of the Department of Justice for the last preceding fiscal year, and of any other matters appertaining thereto that he may deem proper, including a statement of the several appropriations now or which may hereafter be placed under its control, the amount appropriated, and a detailed statement of the amounts used for defraying the expenses of the United States courts in each judicial district; also the statistics of crime under the laws of the United States, and a statement of the number of causes, civil and criminal, pending during the preceding year in each of the several courts of the United States.

• • • • •
“SEC. 1765. No officer in any branch of the public service, or any other person whose salary, pay, or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation.”

At the November term (December 21), 1883, of the Circuit Court of the United States for the Eastern District of Texas, an account was by the Court approved against the United States in favor of C. Dart for

\$55, for eleven days at \$5 per day in October, 1883, for services in selecting jurors under section 2 of the act of June 30, 1879 (21 Stat., 43). During the time when these services were performed by said Dart, he was Clerk of said Circuit Court.

July 3, 1884, this account was by the Attorney-General approved for \$25, to be paid from the appropriation for miscellaneous expenses of United States Courts, and referred to the First Auditor.

July 25, 1884, the First Auditor disallowed the claim, "upon the ground that the fee-bill does not allow the Clerk a per diem for any services except for attendance on courts."

The First Comptroller is now required to decide whether the claim so presented shall be allowed.

DECISION BY WILLIAM LAWRENCE, *First Comptroller.*

The First Auditor properly holds that the claimant, being an officer—the Clerk of a United States Circuit Court—is not entitled to payment for the services in question; because the act prescribing "Clerks' Fees" provides none for such services. The claimant is not a *Jury Commissioner* under the act of June 30, 1879 (21 Stat., 43, sec. 2). That act imposes upon the Clerk of the Court, *as such*, the duty of aiding a Jury Commissioner, therein authorized, in selecting jurors. This is a part of the *official* duty of the Clerk as such. No statute prescribes any fee or compensation for these services of the Clerk. It is well settled, that Congress may require new and additional duties of an officer, and that, unless the payment of compensation therefor is expressly, or by clear inference, authorized, none can be allowed (Meigs's case, 4 Lawrence, Compt. Dec. 596, 619, 620, 621, 628; Contempt case, *ante*, 257; Double Per Diem case, *ante*, 278). On this ground the claim must be rejected. Of course, Congress cannot *require* of a judicial officer purely executive or administrative duties in no way connected with judicial acts or authority.

The claim in this must be rejected on another ground. The Clerk is within the meaning of section 1765 of the Revised Statutes, an "officer in * * * [a] branch of the public service, * * * whose salary, pay, or emoluments are fixed by law." By the express terms of this section he cannot lawfully "receive any additional pay, * * * [beyond his official fees or compensation prescribed by statute], for any other service or duty whatever, [whether in the line of his official duty or not,] unless [1] the same is authorized by law, and [2] the appropriation therefor explicitly states that it is for such additional pay."

The services for which compensation is asked are "authorized by law," but there is no appropriation made in express terms to pay for such services.

If it be said that the last clause of section 1765 has no meaning, as applied to the large and "influential" class of persons who hold office, and that in their favor such clause may be disregarded as meaningless.

contrary to the general rule applicable to other persons, that effect must, if practicable, be given to "every word and clause" of a statute, "leaving no useless words" (Bishop, *Written Laws*, 82), yet it has been at all events authoritatively decided, in principle at least, that compensation cannot be paid in such case as this to an officer, "unless the service he has performed is required by existing laws, and the remuneration for them [it] *fixed [in amount] by law*" (*Converse v. United States*, 21 How., 473, 474). One purpose of the statute has been declared to be to prohibit compensation, fixed by no law, but only *in the discretion* of some officer (*Id.*, 470). It has been insisted with much force, that full effect should be given to the last clause of section 1765 (*Id.*, 477). The cases of *United States v. Brindle* (110 U. S., 688), and *Converse v. United States* (21 How., 463), only apply, so far as the facts of those particular cases are concerned, to extra services which do not pertain to the duties of the offices held by the persons claiming the compensation, and in that respect, differ from the present case. But the language of section 1765, and the opinions in those cases, show that the claim for compensation in this case is unsupported by law. In fact, the prohibitions of said section are, if possible, more effective against additional pay for services in the line of official duty than against compensation for extra services in no way a part of official duty. These prohibitions, however, in express terms apply in both instances, whatever may be the nature of the services. This has been decided in numerous cases.

Section 1765 of the Revised Statutes declares that no officer with fixed salary shall receive additional pay "for the disbursement of public money, or for any other service or duty whatever." Before this statute was enacted, the most frequent allowances of pay in addition to the salaries of officers were for services in disbursing money, which were in no way connected with the duties of the offices. Hence, these services were particularly specified; but, on the maxim, *noscitur à sociis*, the prohibitions apply against compensation for all unofficial services. Without a prohibition on the subject, an officer cannot receive for official services any compensation except that prescribed by law. An officer who renders services beyond the usual hours is not entitled to additional pay; because the statutes prescribing salaries, fees, and compensation fix, and, so, limit, the whole amount which can lawfully be paid. But section 1765 applies in terms to officers and official services, as well as to employés and unofficial services.

The case of *United States v. Brindle* (110 U. S., 688, 694) is authority for the payment of "a reasonable compensation," only on the particular facts of that case (*Meigs's case*, 4 Lawrence, *Compt. Dec.*, 632). The claim herein presented is disallowed.

TREASURY DEPARTMENT,

First Comptroller's Office, August 5, 1884.

IN THE MATTER OF THE RIGHT OF A CONSUL TO RECEIVE SALARY
FROM THE DATE OF HIS COMMISSION.—SCHROEDER'S CASE.

1. A Consul is entitled to salary commencing, not with the date of his commission, but only after he has taken the oath of office, from the "time he devotes himself to the public service."
2. *Dunn's Case* (4 Lawrence, Compt. Dec., 410) re-affirmed.
3. A regulation of an Executive Department cannot prescribe the time when a salary fixed in amount by act of Congress for a specified officer shall commence, unless some statute clearly gives authority to do so.

Prior to July 7, 1884, the Consulate at San Jose, Costa Rica, was an office compensated by fees under sections 1730 and 1732 of the Revised Statutes. See United States Consular Regulations of 1881, page 20, par. 49. The act of July 7, 1884 (23 Stat., 227, 230, 231), "making appropriations for the consular and diplomatic service of the Government for the fiscal year ending June thirtieth, eighteen hundred and eighty-five," changes this Consulate into a salaried office with salary at the rate of \$2,000 per annum. John Schroeder having been nominated to the Senate for Consul at San Jose, Costa Rica, the nomination was confirmed July 5, 1884.

The Assistant Secretary of State addressed a circular letter dated July 15, 1884, to "John Schroeder, Esq., Appointed Consul of the United States at San Jose, Costa Rica," in which it is said:

"SIR: In transmitting the notice of your appointment to the office of Consul, at Costa Rica, I have further to acquaint you that you are entitled to compensation at the rate of your salary only from the time when you shall reach your post and enter upon your official duties to the time when you shall cease to hold such office; and also for such time as you shall be actually and necessarily occupied in receiving your instructions, not to exceed thirty days; and finally, for the time actually and necessarily occupied in making the direct transit between the place of your residence when appointed and your post of duty at the commencement and termination of the period of your official service, not exceeding twenty-five days.

"Your compensation is fixed by law at \$2,000 per annum, at which rate you will be paid for the periods of service above mentioned.

"Your compensation will *begin* with July 5th, 1884, that being the date of your commission, but *not until you have signified your acceptance of the appointment by taking the oath of allegiance and of office*, of which a copy is herewith inclosed. When this act is performed you will be entitled to compensation for a period so long as may be necessary, not exceeding thirty days, *while you are ACTUALLY occupied in receiving instructions*. At the expiration of this period you will receive your passport, and be paid for the number of days during which you may have been occupied in receiving instructions."

August 2, 1884, the Assistant Secretary of State, in a letter to the First Comptroller, said that:

"The rule of this Department (which has prevailed for many years, indeed, ever since August, 1856) is, that the Consul's salary commences

with the date of his commission. The Treasury Department, and especially your office, has, during all this period acquiesced in, and assented to this (to my mind) just interpretation * of the law, and I am unable to perceive any good reason now, for changing the rule or the practice. It is, moreover, the plain reading; the very letter of the law; see Rev. Stat., Sec. 1470; Consular Regulations, Par. 44, p. 16.

*This is explained by a letter from the First Comptroller to the Assistant Secretary of State, August 5, 1884, in which it is said:

"I am not aware of any account of a consular officer which has been heretofore allowed in this office, when there was official notification or evidence on file, showing that the oath of office was taken at a date subsequent to that on which the salary began. The accounts of consular officers for salary while receiving instructions are invariably allowed upon an official letter from the Department of State (usually addressed to the Fifth Auditor), stating the exact time to be allowed, [and] the respective dates on which the salary begins and terminates. The accounting officers in acting upon this official information from the Department of State, are warranted in assuming that the dates assigned by said Department, as the limit of time for which a consular officer shall be allowed salary while receiving instructions, have been fixed with due regard to the provisions of law respecting the oath of office, and subordinate to the requirements of the statute."

The same letter says that:

"When Mr. Schroeder first presented himself to this office, for the purpose of having his account for salary, while receiving instructions, made out and paid, he submitted a semi-official communication from the Chief of the Consular Bureau of the Department of State, stating that 'Mr. Schroeder, our new Consul at San Jose, C. R., is entitled to pay from July 5th, 1884.'"

It is ascertained from Mr. Schroeder, that on the 7th of July, 1884, he resigned a position which he held as an employé in the Document Room of the Senate; that he received his pay as such *to and including that day*; and that he took the oath of office as Consul on the next day.

The United States Consular Regulations of 1868 (3d ed.) contain the following:

"331. The Marshals of the United States consular courts are not, like consuls, entitled specifically to compensation for a certain period while receiving instructions, nor while making the transit to and from their respective posts of duty. *In the absence of any statutory provision fixing the time when the salaries of public officers begin, the general rule adopted and enforced in the accounting bureaus has been that such officers are entitled to pay when they have actually entered upon duty.* This rule has usually been applied to heads of Bureaus, Marshals, District Attorneys, Land Officers, and others. [7 Op. Att.-Gen., 307.]

"332. The date of the commencement of receiving compensation is not necessarily that of their appointment, but that at which they *begin to devote themselves to the public service*, that time being fixed by acts performed, as by leaving home to come to the seat of Government for instructions, or by an understanding between them and the head of the Department. It may also be indicated, in the case of the Marshal of a consular court, by the day on which he takes the oath of office and gives the bond for faithful performance of the duties required by law. Then, and *not before*, he may be said to be *in office*, and certainly before these essential formalities are complied with *his salary does not commence*. Whether it begins when they are completed will depend on the question whether *from that time he devotes himself to the public service*. In legal presumption he does; but that presumption is not conclusive; and if the fact be otherwise, the accounting officers, if it appear that the time when a marshal takes the oath of office and files his official bond, is not the time when his official service begins, should accept the latter as the date from which his salary commences. [Opinion of the Attorney-General of the United States, May 12, 1862—10 Op. Att.-Gen., 250.]

"404. The compensation of salaried consular officers while receiving instructions, who are in the United States at the time of their appointment, under the general rule adopted by the Treasury Department, commences with the date of the consular commission, and continues, during the time 'actually and necessarily occupied in receiving instructions, not exceeding thirty days.' This 'time' is determined by the Department of State, and not unfrequently the whole period of thirty days is not required. This rule, however, is *subject to the limitations suggested by the Attorney General in section three hundred and thirty-one.*"

"Mr. Schroeder was confirmed by the Senate on the 5th of July. The appropriation bill providing for the salary of this officer was not approved till the 7th of that month; of course he could not receive any salary before the appropriation was made. It is, however, the opinion of this Department that Mr. Schroeder's salary should commence on, and from, the 7th day of July, 1884, and I venture to express the hope that you will see the justice and propriety of concurring in this view."

The question is thus presented to the First Comptroller for his decision thereon, whether a Consul is entitled to salary commencing with the date of his commission, or only from that of his oath.

DECISION BY WILLIAM LAWRENCE, *First Comptroller*.

The question presented in this case has been substantially decided in Dunn's Case (4 Lawrence, Compt. Dec., 410), which is now reconsidered and re-affirmed. It is unnecessary to repeat the authorities cited in that case, or the reasoning by which it is supported. Congress can enact a statute in a form which will expressly give an officer a right to compensation retroactively, even back of the time when he takes the oath of office to the date of his commission, or of his nomination to the Senate. But no statute has so provided as to Consuls. And it is clear, that, as the law now stands, a Consul is not entitled to salary prior to the date of his oath of office. The Constitution requires "all executive and judicial Officers * * * of the United States" to "be bound by Oath or Affirmation, to support * * * [the] Constitution" (Const. U. S., Art. VI, par. 3; Story, Const., §§ 1844-1846). The first act passed by the first Congress under the Constitution prescribed a form of oath, and declared that—

"All officers * * * hereafter to be appointed * * *, shall, before they act in their respective offices, take the same oath or affirmation" (Act June 1, 1789—1 Stat., 24, sec. 4).

The Revised Statutes contain the following provisions:

"SEC. 1756. Every person elected or appointed to any office of honor or profit, either in the civil, military, or naval service, excepting the President and the persons embraced by the section following, shall, before entering upon the duties of such office, and before being entitled to any part of the salary or other emoluments thereof, take and subscribe the following oath: 'I, A B, do solemnly swear (or affirm) that I have never voluntarily borne arms against the United States since I have been a citizen thereof; that I have voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto; that I have neither sought, nor accepted, nor attempted to exercise the functions of any office whatever, under any authority, or pretended authority, in hostility to the United States; that I have not yielded a voluntary support to any pretended government, authority, power, or constitution within the United States, hostile or inimical thereto. And I do further swear (or affirm) that, to the best of my knowledge and ability, I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without

any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of the office on which I am about to enter, so help me God."

"SEC. 1757. Whenever any person who is not rendered ineligible to office by the provisions of the fourteenth amendment to the Constitution is elected or appointed to any office of honor or trust under the Government of the United States, and is not able, on account of his participation in the late rebellion, to take the oath prescribed in the preceding section, he shall, before entering upon the duties of his office, take and subscribe in lieu of that oath the following oath: 'I, A B, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.'"

The act of May 13, 1884 (23 Stat., 22, sec. 2), provides:

"That section seventeen hundred and fifty-six of the Revised Statutes be, and the same is hereby, repealed; and hereafter the oath to be taken by any person elected or appointed to any office of honor or profit either in the civil, military, or naval service, except the President of the United States, shall be as prescribed in section seventeen hundred and fifty-seven of the Revised Statutes. But this repeal shall not affect the oaths prescribed by existing statutes in relation to the performance of duties in special or particular subordinate offices and employments."

This latter act was not designed to change the effect of that provision of section 1756 of the Revised Statutes which requires officers and employés to take the oath "before *being entitled* to any part of the salary." Said provision is applicable to persons taking the oath under section 1757 of the Revised Statutes, as fully as if therein incorporated. Section 1757 is not modified, but remains in force, and has the same effect which it had before the act of May 13, 1884, was passed. Said section requires every person to take the oath, "before entering upon the duties of his office." The purpose of the act of May 13, 1884, was simply to remove the test-oath—not to change the law as it affected the right to salaries. The provision above quoted from section 1756 of the Revised Statutes is *not* that a person appointed to office shall take the oath "before being" paid "any part of the salary", but such provision is that he shall take the oath "before being *entitled* to any part of the salary." It would be a palpable perversion of the language and purpose of this section, to say that, when the oath of office has been taken, the provision referred to *then* authorizes or permits salary to be paid for any anterior period.

Until a person commissioned as Consul has taken the oath of office, he is not a Consul—he is not an officer—he can do no official act (Meigs's Case, 4 Lawrence, Compt. Dec., 608). A salaried Consul is entitled to salary "for such time as is actually and necessarily occupied in receiving his instructions, not to exceed thirty days" (Rev. Stat., 1740). But he cannot receive instructions, until he has taken the oath of office. The statute authorizes the instructions to be given *only* to consular and diplomatic *officers*, and a person commissioned as Consul is not a Consul,

until he has taken the oath of office. His oath requires him to "well and faithfully discharge the duties of the office." One duty may be to observe secrecy as to the tenor of his instructions. If he can receive these before taking the oath of office, they are given without the official sanction of the oath: after receiving instructions he might refuse to take the oath, and, thus, might betray the secrets of the Government in a mode calculated to be ruinous to our national safety in war, and to our commercial interests in peace.

The act of July 7, 1884 (23 Stat., 227, 229), entitled "An act making appropriations for the consular and diplomatic service of the Government for the fiscal year ending June thirtieth, eighteen hundred and eighty-five and for other purposes," makes an appropriation to pay "for salaries of *consuls*." There is no appropriation to pay a person who is not a Consul, or to pay one merely commissioned as Consul; but an appropriation is made, in the words of the statute, "for salaries of *Consuls*." And, as already shown, until a person commissioned as Consul has taken the oath of office, he is not a Consul.

It seems to be supposed that section 1740 of the Revised Statutes in some way affects this question, but said section clearly gives no right to salary before the taking of the oath of office, and is as follows:

"No ambassador, envoy extraordinary, minister plenipotentiary, minister resident, commissioner, chargé d'affaires, secretary of legation, assistant secretary of legation, interpreter to any legation or consulate, or consul-general, consul, or commercial agent, mentioned in Schedules B and C, shall be entitled to compensation for his services, except from the time when he reaches his post and enters upon his official duties to the time when he ceases to hold such office, and for such time as is actually and necessarily occupied in receiving his instructions, not to exceed thirty days, and in making the direct transit between the place of his residence, when appointed, and his post of duty, at the commencement and termination of the period of his official service, for which he shall in all cases be allowed and paid, except as hereinafter mentioned. And no person shall be deemed to hold any such office after his successor is appointed and actually enters upon the duties of his office at his post of duty, nor after his official residence at such post has terminated if not so relieved. But no such allowance or payment shall be made to any consul-general, consul, or commercial agent, not embraced in Schedules B and C, or to any vice-consul, vice-commercial agent, deputy consul, or consular agent, for the time so occupied in receiving instructions, or in such transit as aforesaid; nor shall any such officer as is referred to in this section be allowed compensation for the time so occupied in such transit, at the termination of the period of his official service, if he has resigned or been recalled therefrom for any malfeasance in his office."

This is taken from section 8 of the act of August 13, 1856 (11 Stat., 55), which is referred to in an opinion by Attorney-General Bates May 12, 1862 (10 Op., Att. Gen., 251).

Section 1740 recognizes the right of a *Consul* to salary, but not the right of a person, who has not taken the oath of office, and may never become an officer.

The United States Consular Regulations of 1881 have the force of law, so far as they (1) can operate on a subject-matter, and (2) are not in conflict with the Constitution, or some statute.

They (page 16, par. 44) provide that:

"Consuls-General, Consuls, and Commercial Agents, in Schedules B and C, receiving salaries fixed by law are entitled to compensation at the rate of their respective salaries, as follows, viz:

1^o. For the *time*, beginning with the date of the commission, *actually* and necessarily *occupied in receiving instructions* in the United States, not exceeding thirty days."

When these regulations say that "*Consuls*" shall receive salaries "beginning with the date of the commission," it must be supposed that they apply to the *officers* known as "*Consuls*," and not to persons who have not yet taken the oaths of office, and so are *not* "*Consuls*." Said regulations give salaries "*for the time* * * * occupied in receiving instructions." This time cannot begin until the oath of office has been taken. It is not to be supposed that the above regulations were intended to effect the impossible result of repealing that clause of section 1756 of the Revised Statutes which is by inference a part of section 1757, and declares that "every person * * * appointed to any office * * * shall, * * * before being *entitled* to any part of the salary * * * thereof, take and subscribe" the oath of office. No statute declares, that, *when* the oath of office is taken, a right to salary shall exist retroactively from the date of the commission. The statute, by giving a right to a salary from the time when the person takes the oath and enters on duty, inferentially prohibits payment for any antecedent period. If no statute specifically fixed a time when the right to salary should *begin*, the necessary effect of a statute giving salary to an officer would be that, it would commence when the person appointed took the oath of office and entered on duty. This is the universal usage founded on inference necessarily arising from salary-statutes. An inference arising from a statute is as forcible law as an express provision (Bliss's case, *ante*, 42). It cannot be repealed by a regulation. The right to salary can only exist by act of Congress (Contempt case, *ante*, 257). A regulation cannot create such right. No claim of this character has ever been made. Congress could, of course, by express statute authorize a regulation giving a right to salary. But no such statute exists, as applicable in this case.

Retroactive compensation cannot be given by a regulation (Meigs's case, 4 Lawrence, Compt. Dec., 589, note, and authorities cited.) Nor can it be paid by force of an illegal usage. No usage, however long continued, becomes legal which is in direct conflict with a plain statute (Broom, Legal Max., 7th ed., 684; The Floyd Acceptance case, 1 Ct. Cl., 270). Neither time nor usage can sanctify a practice palpably in violation of a clear statute. Justice does not require that a person shall be regarded as having earned a right to salary without having rendered any service and before he has consented to become an

officer by taking the requisite oath of office. If, as said by Attorney-General Black, July 21, 1858 (9 Op. Att.-Gen., 198), "an officer forfeits all right to his salary * * * when he does not perform the service assigned to him," he certainly can have no claim to salary for a period before he has become an officer, and during which he has rendered no service. See Evans's case (2 Lawrence, Compt. Dec., 2d ed., 10). The interests of the United States will not suffer by withholding the payment of salary for the term before the oath of office is taken.

Nor will any injustice be done to a person appointed to a Consular office. In practice the Department of State can transmit, to every person whose nomination has been confirmed by the Senate, the blank form of the requisite oath of office, along with the notice of appointment; immediately on receipt of which the oath can be taken after the date of the commission, even though the latter be not then actually delivered. The *delivery* of the commission is not necessary to perfect an appointment (*Marbury v. Madison*, 1 Cranch, 137). When the oath is taken, under the circumstances stated, and the officer immediately "devotes himself to the public service," his right to salary will begin.*

The account of Mr. Schroeder, presented August 4, 1884, claims salary "from July 8, 1884," which will be construed inclusive of the latter date. He will be allowed compensation accordingly.

TREASURY DEPARTMENT,

First Comptroller's Office, August 7, 1884.

* Attorney-General Bates, in an opinion May 12, 1862 (10 Op. Att.-Gen., 251, 252), as to the salary of an officer with "duties * * * to be performed in foreign countries," said:

"I know no better rule than that referred to by Mr. Cushing, which fixes the commencement of his salary at the time when he begins to devote himself to the public service. This time is, I presume, usually when he takes his oath of office and gives the bond for faithful performance of duty required by law. Then, and not before, he may be said to be in office, and certainly before these essential formalities are complied with his salary does not begin. Whether it begins when they are completed, will depend on the question whether from that time he devotes himself to the public service. In legal presumption he does, but that presumption is not conclusive, and if the fact be otherwise, the accounting officers, if it appear that the time when he qualifies is not the time when his official service begins, should accept the latter as the date from which his salary runs.

"And, except where it is so directed by statute, I do not think that the salary of a public officer, whose duties require him to leave the country, should be withheld until he reaches the field of his service. Every person appointed to an office of that kind has preliminary duties to perform before he leaves the country, and, after he has taken the official obligations in the manner prescribed by law, as by making oath and giving bond, the time and labor devoted to those preliminary duties, as well as the time occupied in reaching his official post, are just as much spent in the public service as though he were already at that post exercising its more immediate functions."

IN THE MATTER OF THE RIGHT OF THE LEGAL REPRESENTATIVE OF A. LA COMBE TO COLLECT, UNDER THE DEFICIENCY ACT OF JULY 7, 1884, A SUM THEREBY APPROPRIATED TO PAY SALARY.—MISNOMER CASE.

1. When a statute appropriates money "to pay amount found due A. La Comte, deceased, late consul at Puerto Cabello, on account of salaries, consular service," and specifies the amount to be paid, which is the actual sum "found due" A. La Combe, who was consul as described, said sum may be paid to the legal representative of said La Combe, when it appears that no such person as A. La Comte was consul.
2. When a statute, employing descriptive terms, sufficient in themselves to identify a person, attempts in addition to describe him by a misnomer, the latter may be rejected as an error.

The deficiency act of July 7, 1884 (U. S. Stat., 1883-'84, page 237), making appropriations to supply deficiencies in the appropriations for the fiscal year 1884, and for other objects, makes an appropriation as follows :

"To pay amount found due A. La Comte, deceased, late consul at Puerto Cabello, on account of salaries, consular service, being a deficiency for the fiscal year eighteen hundred and eighty-two, two hundred and twenty-eight dollars and eighty-five cents."

The correct name of the consul mentioned was A. La Combe and the sum of \$228.85 was due from the United States to said La Combe when he died, for his salary during the fiscal year 1882.

The question is presented to the First Comptroller to decide whether that sum can be paid to the legal representative of A. La Combe, deceased.

DECISION BY WILLIAM LAWRENCE, *First Comptroller*.

The name of A. La Compte, as found in the statute, is an undoubted misnomer. There never has been a consul of that name. If the name were entirely omitted from the statute, there would be sufficient words left to authorize a payment to the "deceased, late consul at Puerto Cabello," for salary due him and remaining unpaid for the fiscal year 1882. In such case the misnomer may be rejected. Thus it is said :

"The rule, in such cases, is derived from the maxim : *Falsa demonstratio non nocet, cum de corpore constat*. Here so much of the description as is false is rejected ; and the instrument will take effect, if a sufficient description remains to ascertain its application. It is essential, that enough remains to show plainly the intent. 'The rule,' said Mr. Justice Parke, 'is clearly settled, that when there is a sufficient description set forth of premises, by giving the particular name of a close, or otherwise, we may reject a false demonstration ; but, that if the premises be described in general terms, and a particular description be added, the latter controls the former.'" (1 Greenl. Ev., sec.

301; Wharton Ev., 412, 945, 1004; Broom's Legal Max., 629; Hardcastle, Statutory Law, 246; 9 Op. Att.-Gen., 1,270; Jordan's Case, 3 Lawrence, Compt. Dec., 278.)

The principle of the maxim applies as well in the case of a misnomer of a person in a statute, as to errors in describing property mentioned in contracts.

The legal representative of A. La Combe, late consul at Puerto Cabello, can be paid the salary remaining due and unpaid to said consul at the time of his decease.

TREASURY DEPARTMENT,

First Comptroller's Office, August 14, 1884.

IN THE MATTER OF COMPENSATION FOR NEWSPAPER ADVERTISING AS REQUIRED BY LAW, IN CASES OF INFORMATION *IN REM* UNDER INTERNAL REVENUE LAWS.—PRINTERS' FEE CASE.

- I. State laws cannot control acts of Congress, regulating proceedings in the national courts, but Congress may and has adopted State laws in some respects as to such proceedings.
- II. That clause of section 853 of the Revised Statutes, which relates to "any notice, or order required by law," includes all such notices and orders for whatever purpose, except as otherwise provided.
- III. Section 853 of the Revised Statutes prescribes compensation in certain cases for publishing any notice or order when (1) required by law, or (2) the lawful order of any court, or (3) any Department, Bureau, or other person.

Held:

- (1) A notice, "required by law," is one imperatively required by statute.
- (2) The "lawful order of any court," is one which the court is authorized to make either by statute, or by its incidental power.
- (3) The "lawful order of any Department," is one made by virtue of an express statute, or by authority of incidental power.
- IV. The notices published in newspapers, in the nature of means process, or to aid in the execution of final process, in cases of informations *in rem* or libel under the internal-revenue laws are "required by law" or "required by the lawful order of any court."
- V. Sections 3823 and 3825 of the Revised Statutes do not prescribe the compensation for publishing the notices above mentioned in States other than the ten mentioned in the former section.
- VI. The act of June 20, 1878 (20 Stat., 216), specifies the compensation to be paid for publishing in a newspaper "all advertisements, notices, proposals for contracts, and all forms of advertising" *wherever published*, which are expressly required by statute for any Executive Department, or which, in pursuance of express or implied authority, may be published by order of the head of any such department, or any officer thereof and acting therefor.
- VII. Said act of June 20, 1878, applies to notices published by collectors of internal revenue, as required by law, the compensation for which is not a part of the costs taxed in any case in court.
- VIII. Section 853 of the Revised Statutes applies to notices (1) "required by law" in cases or proceedings in court or taxable as a part of the costs in such case or proceeding, and (2) to all notices required by the lawful order of any court except, in both such classes of cases, in the ten States mentioned in sections 3823, 3824 and 3825 of the Revised Statutes.

- IX. In the *ten States* named in section 3823 of the Revised Statutes said section prescribes compensation for publishing (1) "all such advertisements as may be ordered for publication * * * by any United States court or judge thereof, or by any officer of such courts"; and (2) in connection with section 3823, it prescribes compensation "for the publication of the treaties and laws of the United States in * * * all the States" when and so far as lawfully ordered to be published.
- X. The effect of the construction given to the statutes above mentioned is: that the act of June 20, 1878 (20 Stat., 216), by implication, repeals prior acts as follows:
- (1) So much of section 853 of the Revised Statutes, as relates to compensation "for publishing any notice, or order, required by law, or the lawful order of any * * * department, Bureau, or other person in any newspaper * * *" for "the several departments of the government."
 - (2) So much of section 3823 as prescribes compensation for publishing "all such advertisements as may be ordered for publication in said districts [ten States therein named] * * * by any executive officer of the United States and which advertisements are "required by law for the several departments of the government."
- XI. The act of June 20, 1878, prescribes compensation for publishing notices for all forms of advertising for public officers in no way connected with any executive department; *e. g.*, the Public Printer.

March 23, 1884, George H. Thomas, United States Attorney for the district of Kentucky, addressed the following letter to the First Comptroller, viz:—

"The court desires me to ask your ruling as to printers' fees. It has been the practice here to tax the costs of advertising in informations in rem under the internal revenue laws* at 40 cents per folio of 150 words

* One of the notices was as follows:

"U. S. Marshal's Notice.

THE UNITED STATES OF AMERICA,
District of Kentucky, ss: No. 5,222.

Whereas, an information has been filed in the Circuit Court of the United States, for the District of Kentucky, on the 23d day of January, A. D., 1882, by George M. Thomas, Esq., Attorney for the United States for the District of Kentucky, who prosecutes herein in behalf of the United States, against 2 copper stills, worms and other distilling apparatus, and one-half acre of land, the distillery premises of Wilson R. Lee, in Fleming County, Ky., alleging, in substance, that the said articles were seized on the 30th day of November, 1881, by John E. Blaine, Collector of Internal Revenue for the Ninth District of Kentucky, for a violation of sections 3281 and 3460 of the Revised Statutes of the United States. And that said articles became thereby forfeited to the use of the United States of America, and praying process against the same, that the same may be condemned as forfeited as aforesaid.

"Now, therefore, in pursuance of the motion under the seal of said court, to me directed and delivered, I do hereby give public notice to all persons claiming said articles or in any manner interested therein, that they be and appear before the said court, to be held at the city of Louisville, in and for said district, on the first day of its next October term, the 2d day of October, A. D., 1882, then and there to interpose their claims and to make their allegations in that behalf.

"A. J. AUXER, U. S. M. K. D.

"GEO. M. THOMAS,
U. S. Attorney."

Other notices related to forfeitures for violations of sections 3253, 3299, 3303, 3305, and 3453. One of the notices of the sale was as follows:

"U. S. Marshal's Sale.

"Whereas, information was filed in the Circuit Court of the United States for the District of Kentucky at Louisville, on the 7th day of June, in the year of our Lord,

for the first insertion and 20 cents for each subsequent insertion, as provided by 853 R. S. It is contended by the publishers that such advertisements are covered by 3823 and 3825 R. S. which make the bills about five times as much."

OPINION BY WILLIAM LAWRENCE, *First Comptroller.*

Under various provisions of law, collectors of internal revenue are authorized to make seizures of realty and chattels forfeited to the United States, for violations of the internal revenue laws. (Rev. Stat., 3166, 3242,—as amended by act of February 8, 1875—18 Stat., 310, Sec. 16—3209, 3453, 3456, 3457, 3458, 3459, 3460.) When the seizure is made, the collector is required in certain cases to publish a notice, for three weeks, in some newspaper of the district where the seizure was made, describing the articles, and stating the time, place, and cause of the seizure, and requiring any person claiming them to appear and make such claim within thirty days from the date of the first publication of such notice. (Rev. Stat., 3460, Cl. second.) And the District Attorney is required to institute and conduct proceedings in court, "in the ordinary manner prescribed by law" (Rev. Stat., 3460, Cl. third, 3213, 3214, 3215, 3216). The statutes applicable to courts *recognize* their authority to adopt any usual mode of procedure. The proceeding by *libel* is recognized in section 978 of the Revised Statutes. In a standard authority on practice in the United States Courts, it is said, "In their structure, the libel and information are essentially alike, as will be seen by consulting the precedents in the Appendix" (Conkling's Treatise, 3d ed., 554).

It is made the duty of collectors in certain cases to prosecute in the proper court for any sums which may be forfeited (Rev. Stat., 969, 3213, 3214, 3459). And, in certain cases, "the cost of seizure made before process issues shall be taxable by the court" (Rev. Stat., 3458). In certain cases of forfeiture of goods found in the custody of any person for the purpose of being sold or removed in fraud of the internal revenue laws, or with the design to avoid payment of taxes (Rev. Stat., 3453) proceedings may be commenced in the proper court, and the marshal is required to "give notice of pendency of proceedings in court * * * by publication and in such manner and form as the court may direct" (Rev. Stat., 3459). In all cases of sales of chattels or realty on

1882, by George M. Thomas, Esq., Attorney of the United States for the said district, on behalf of the United States of America, against twenty-seven barrels of distilled spirits, apple and peach brandy, and twenty-two empty casks.

"And, whereas, the said articles were condemned as forfeited by a decree of the said court pronounced on the 24th day of October, 1882, and ordered to be sold. Now, in pursuance of said judgment and decree, I will, on the 4th day of December, 1882, at 1 o'clock p. m., in the city of Bowling Green, in the county of Warren, and State aforesaid, offer for sale the above articles.

Terms of Sale: cash in hand; the spirits will be sold subject to the tax of 90 cents per proof gallon, the tax to be paid by the purchaser.

"A. J. AUXIER,

U. S. Marshal.

"By T. W. CAMPBELL,
Deputy Marshal."

judgments in favor of the United States, the marshal executes the proper writ of sale, and publishes a notice of sale (Rev. Stat., 787, 788, 3470; *Smith v. Cockrill*, 6 Wall., 756; *Moncure v. Zunts*, 11 Wall., 416; Conkling's Treatise, 3d ed., 566-7; Freeman on Executions, 285, 286; *Beers and others v. Haughton*, 9 Pet., 361; *Parsons v. Bedford et al.*, 3 Pet., 445.) These authorities show that State laws cannot control acts of Congress regulating proceedings in the national courts, but Congress may and has adopted State laws in some respects as to such proceedings. So collectors are authorized to distrain chattels and realty to satisfy taxes. (Rev. Stat., 3166, 3187, 3196, 3197,—as amended by section 3 of act of March 1, 1879,—20 Stat., 331-3198, 3199, 3200.) In cases of distraint of chattels for the purpose of collecting internal revenue taxes, it is provided that "the officer charged with the collection * * * shall cause a notification to be published in some newspaper" which "notice shall specify the articles distrained, and the time and place for the sale thereof" (Rev. Stat., 3190). And a sale is authorized (Rev. Stat., 3186-3195). And see Rev. Stat., 3459, 3460. An internal-revenue officer making a seizure of realty liable to distraint for taxes, is required to cause a notification to be published in some newspaper, after which he may make a sale (Rev. Stat., 3196-3205, 3197,—as amended by section 3 of the act of March 1, 1879, 20 Stat., 331).

In view of what has been said, the inquiry arises, by what statute is the compensation prescribed for publishing the notices mentioned?

The act of February 26, 1853 (10 Stat., 161, 168), entitled "an Act to Regulate the Fees and Costs to be allowed Clerks, Marshals, and Attorneys of the Circuit and District Courts of the United States, and for other Purposes," as carried into the Revised Statutes, section 853, under Title XIII, "The Judiciary," and under the caption of "Printers' Fees," provides that:

"SEC. 853. For publishing any notice, or order (1), required by law, or (2) the lawful order of any court, (3) Department, Bureau, or other person, in any newspaper, except as mentioned in sections thirty-eight hundred and twenty-three, thirty-eight hundred and twenty-four, and thirty-eight hundred and twenty-five Title, 'PUBLIC PRINTING, ADVERTISEMENTS, AND PUBLIC DOCUMENTS,' forty cents per folio for the first insertion, and twenty cents per folio for each subsequent insertion * * *."

Under section 5600 of the Revised Statutes, " * * * no inference or presumption of a legislative construction is to be drawn by reason of the Title, under which any particular section is placed." The act of February 26, 1853 (10 Stat., 161, 168), from which said section 853 was taken, relates almost exclusively to courts and their officers or those having duties in relation to the said tribunals. But the provision relating to "printers' fees," is very general, including notices published "when required by law, or the lawful order of any court, Department, Bureau, or other person * * *." These terms are so wide as to include all notices published as mentioned, unless otherwise specially pro-

vided for (15 Op. Att.-Gen., 595; *Id.*, 633; 6 Op. Att.-Gen., 502). This section *expressly* fixes the fee for publishing any notice, or order (1) required by law, or (2) required by the lawful order of any court, or (3) by the lawful order of any Department, Bureau, or other person. If, therefore, "advertising in informations *in rem* under the internal-revenue laws" is required by either of the three authorities above mentioned, the amount of the "printers' fee" therefor is prescribed by said section 853, unless otherwise excepted therefrom. Said section 853 specifies *three classes* of notices, the character of each of which it may be proper to consider.

(1.) When is the "publishing [of] any notice or order *required by law*?"

When a statute expressly requires a notice to be published, and especially if the substance, time and manner thereof, be specified, this is a publishing *required by law*. An example of such notice may be found in the statutes regulating seizures and sales on distraint under the internal-revenue laws, and in section 3723 of the Revised Statutes requiring advertisements for thirty days in two daily newspapers in the city of New York for foreign supplies for the Navy.

(2.) What is a notice published by the *lawful order* of any court?

When a statute expressly authorizes a court to publish a notice or order in such manner as the court may direct, even with limitations upon the exercise of such discretion, this may be said to be a notice published by the lawful order of a court. An example of such order is presented in the act of March 3, 1875 (18 Stat., 472, sec. 8). See Rev. Stat., 738, 3459; Bingham, etc., *v.* Luddington and others, 12 Blatchf., 237; Bronson *v.* Keokuk, 2 Dill., 499; Parsons *et al. v.* Howard *et al.*, 2 Wood, 1; Kilgour *v.* The New Orleans Gas-Light Co. *et al.*, 2 Wood, 144. So, if a court, by its authorized rules of practice, or by virtue of its general incidental authority, orders a notice to be published, this would belong to the same class.

(3.) What is a notice published by the lawful order of any Department, Bureau, or other person?

This may be inferred from what has been already said. When a statute expressly authorizes the head of any Department, Bureau, or other designated person, to publish a notice or order in such manner as he may direct, this is a notice of the third class. Examples of this class may be found in sections 3709 and 3716 of the Revised Statutes, subject to exceptions created by section 3826 and the act of March 3, 1875 (18 Stat., 342). See Rev. Stat., 3827, 3941. Examples of cases in which officers without express authority *order* advertisements to be published, may be found in appropriation acts which authorize specified officers to procure services or supplies in such manner as they may deem proper.

With these principles and examples in view, it is clear that the notices in what are called, in the letter now in question of the United States Attorney in Kentucky, "informations *in rem* under the internal

revenue laws," are published either because "required by law," or by "the lawful order of any court." They are not published by any order of any Department, Bureau, or authorized unofficial "person." It follows that section 853 of the Revised Statutes prescribes the compensation to be paid for publishing the notices now in question, unless (1) it is inapplicable thereto, by reason of sections 3823 and 3825 of the Revised Statutes or (2) because of some subsequent act.

(1) The question now arises, do sections 3823 and 3825 of the Revised Statutes except such notices from the operation of said section 853, and provide a different rate of compensation for publishing them? Said sections are under "Title XLV.—'PUBLIC PRINTING,'" and authorize the clerk of the House of Representatives to select one or more newspapers in *ten States named*, but *not including Kentucky*, in which "shall be published, * * * all such advertisements as may be ordered for publication in said districts [States] (1) by any United States court or judge thereof, or (2) by any officers of such courts, or (3) by any executive officer of the United States, * * *."

On a well-settled principle, sections 853 and 3823 of the Revised Statutes are to be so construed that each shall have some purpose "not embraced in the other, so that each may have effect and a separate purpose" (*Huidekoper's Case*, second, 3 Lawrence, Compt. Dec., 160). On this principle, if both sections applied to advertisements in the *same classes of cases*—which they do only in part—section 3823 would be held applicable only in the ten States therein named, and section 853 in all other States. But it is not necessary to resort to this rule of construction, because section 853 *expressly* excepts from its operation the cases provided for in sections 3823, 3824, and 3825. And these sections, by the express terms of section 3823 *do not apply in Kentucky*, so far as the notices now in question are concerned. Said section 3823 does, by force of section 3825, apply in all the States, but only to the "publication of the treaties and laws of the United States." The question does not now arise, whether in States, *other than the ten named in section 3823*, compensation for such notices, as those now in question, is prescribed by section 853, or by section 3823. It may be observed, however, that section 853 provides "for publishing any notice or order *required by law*," and section 3823 does not.

The question now arises, has any subsequent act rendered said section 853 inapplicable to the notices in question?

(a.) Attorney-General Devens, in an opinion May 21, 1877 (15 Op. Att.-Gen., 282) referring to said sections 853 and 854 of the Revised Statutes said, "The only modification of these sections is by a *proviso* in the appropriation act of March 3, 1875" (18 Stat., 342), which relates to advertisements of mail lettings. And he said, on page 283, that "So far as that [Treasury] Department is concerned, I consider that those sections are still in force, and that they have not been in any way modified."

Solicitor General Phillips, in an opinion August 14, 1876 (15 Op. Att.-

Gen., 594), approved by Attorney-General Taft, in relation to a claim on behalf of the publishers of a newspaper in Washington City for publishing, by due order of the Secretary of the Treasury, an advertisement for stationery for the Treasury Department, said :

"Section 853 treats of publications on behalf of the Government of *notices in general*, and prescribes a certain compensation therefor, viz, 40 cents by the folio, &c. Section 3826 treats of *such notices* as are required to be published in the *District of Columbia*, &c., and prescribes therefor a compensation *not higher than is paid by individuals* for advertising in said paper.

"I understand the joint effect of these two sections to be that papers in the District of Columbia shall have the compensation fixed by section 853, *unless* (under section 3826) *that be more than is paid by private individuals for like services*. This construction reconciles the apparent conflict, and shows why section 3826 is not named with the other sections expressly excepted in section 853. This rule, I believe, has been often applied by courts in like cases, and in the instance before me gives due effect to both sections.

"However, I regard the effect of section 3826 upon section 823 as entirely speculative for all publications of advertisements in newspapers since the act of March 3, 1875, above referred to. (18 Stat., 342.) A provision for repeal as sweeping as that therein contained 'has an effect [in appropriation acts] wholly regardless of the place or the general nature of the act in which it is found.' (7 Opin., &c., 303; 14 *ibid.*, 681.) In my opinion it repeals section 3826 for every purpose connected with the claim before you."

In an opinion of Solicitor-General Phillips, approved by the Attorney-General, July 7, 1877 (15 Op. Att.-Gen., 633), the foregoing opinions were reconsidered and reaffirmed, overruling Attorney-General Cushing's opinion of June 3, 1854 (6 Op. Att.-Gen., 502), in which he held the act of February 26, 1853 (Rev. Stat., 853), only applied to *publications in the case of judicial proceedings*. And, on page 634, the Solicitor-General said:

"Nor has any reason been suggested why the United States should pay for notices required by the lawful order of a *Department* a greater rate than for those required by the lawful order of a court. Both classes of notices are equally important and equally imperative, and they alike are paid for out of the public treasury. It seems to me that the proper answer to a question arising from the *location* of this provision, limiting *Departments*, is that the attention of Congress was called to its propriety by the circumstance that it had in hand the matter of limiting *courts* upon the same point, and thereupon, it probably having been suggested that the relation of printers to the public treasury under an order of a *Department* required regulation as much as where under an order of a *court*, nothing appearing to the contrary, the regulation was *extended* accordingly."

(b.) The construction so given to the statutes in question was thus recognized and acted on until the acts of May 17, 1878 (20 Stat., 61, 62), and June 20, 1878 (20 Stat., 216), since which there has been a conflict of opinion as to the effect of these latter acts. Said act of May 17, 1878, sec. 4, provides as follows :

"Hereafter all advertisements, notices, proposals for contracts, and

all other forms of advertising required by law for the Post Office Department may be paid for at a price not to exceed the commercial rates charged to private individuals with the usual discounts * * * (20 Stat., 62).

The act of June 20, 1878, extended the provisions of the former act to the several Departments of the Government, both acts employing almost the same language. It is evident that this includes "all advertisements, notices, proposals for contracts, and all forms of advertising," *wherever published*, which may be expressly required by statute for any Executive Department, or which, in pursuance of express or implied authority, may be published by order of the head of any such Department or any officer thereof acting therefor. Thus, if the Postmaster-General advertises in a newspaper in Mississippi notices of mail lettings, or, if the Secretary of the Interior publishes in New York proposals for furnishing Indian supplies, or the Secretary of the Treasury publishes in Pennsylvania proposals for furnishing materials or supplies for the use of any officer wherever acting, under the authority of this Department, the compensation for publishing is prescribed by the act of June 20, 1878.

(c.) But the question whether said act applies to (1) notices published by collectors of internal revenue, or (2) by order of court, or (3) as required by statute in proceedings to enforce forfeitures, or (4) in cases of distraint under the internal-revenue laws, is more difficult. This act may be read in connection with section 3828 of the Revised Statutes, which provides that:

"No advertisement, notice, or proposal for any Executive Department of the Government, or for any Bureau thereof, or for any office therewith connected, shall be published in any newspaper whatever, except in pursuance of a written authority for such publication from the head of such Department * * *."

This section gives *no authority* to publish anything; it simply provides that, in cases of authorized publication, no publications shall be made "except in pursuance of written authority," given by the head of the proper Department. This section also requires such written authority in case a publication is to be made for any Bureau of an Executive Department or for *any office* "no matter where situated" (16 Op. Att.-Gen., 617), "connected with" such Department. The office of collector of internal revenue is "connected with" the Treasury Department (Rev. Stat., 319-323; *Id.*, Title XXXV). If, therefore, the act of June 20, 1878, applies to notices published by collectors of internal revenue, it may be plausibly urged that no publication can be made without the written authority of the Secretary of the Treasury.

But, evidently, section 3828 cannot apply to such notices. The statute *expressly requires* the collector to give the notices. The discretion is generally vested in him to select the newspaper in which to publish, but the statute permits no discretion to omit the publication. Section

3828 can only apply when by law the head of a Department can exercise a discretion, either in the selection of a newspaper in which to publish or in determining whether a notice shall or shall not be published. Ever since the act of June 20, 1878, became a law, it has been held applicable to all notices published by collectors of internal revenue, the compensation for which is not a part of the costs taxed in any case in court. Said act does not contain the expression, "any office therewith connected," which is found in section 3828, but its comprehensive language and purpose manifestly include officers acting under the authority of and in connection with any Executive Department. Section 853 of the Revised Statutes specifies the compensation for publishing any notice or order, in three classes of cases, already mentioned. There is no *express repeal* of this section, and later statutes are not to be construed as repealing any part of it by implication, unless their language clearly so requires. If all can stand together and be operative, they are to be so construed. If each can have *some exclusive purpose*, effect is to be given accordingly.

In view of the statutes cited and principles stated, the following conclusions are reached as to the statutes prescribing compensation for publishing notices, &c.

1. Section 853 of the Revised Statutes applies to notices (1) "required by law" in cases or proceedings in court or taxable as a part of the costs in such case or proceeding, and (2) to all notices required by the lawful order of any court except in both such classes of cases in the ten States mentioned in sections 3823, 3824 and 3825 of the Revised Statutes.

2. In the *ten States*, named in section 3823 of the Revised Statutes, said section prescribes compensation for publishing (1) "all such advertisements as may be ordered for publication * * * by any United States court, or judge thereof or by any officer of such courts;" and (2) in connection with section 3823, it prescribes compensation "for the publication of the treaties and laws of the United States in * * * all the States" when and so far as lawfully ordered to be published.

3. The compensation for "all advertisements, notices, proposals for contracts, and all forms of advertising required" by express law or otherwise authorized in the *executive* administration of this Government is prescribed by the act of June 20, 1878. The effect of this construction is that said last-named act, by implication, repeals prior acts as follows:

- (1.) So much of section 853 of the Revised Statutes as relates to compensation "for publishing any notice, or order, *required by law, or the lawful order of any* * * * *Department, Bureau, or other person in any newspaper* * * * " for "*the several Departments of the Government.*" The act of June 20, 1878, in declaring that "*all advertisements, notices, proposals for contracts, and all forms of advertising required by law* for the

several Departments of the Government may be paid for at a price * * * therein prescribed, necessarily repeals, as to the publications mentioned, that portion of section 853 above quoted.

(2.) So much of section 3823 as prescribes compensation for publishing "all such advertisements as may be ordered for publication in said districts [ten States therein named] * * * by *any executive officer of the United States*" and which advertisements are "required by law for the several Departments of the Government." This is the necessary effect of that part of the act of June 20, 1878, which declares that "*all advertisements, notices, proposals for contracts, and all forms of advertising required by law for the several Departments of the Government may be paid for at a price * * * therein prescribed.*"

The question whether the act of June 20, 1878, prescribes compensation for "advertisements, notices, proposals for contracts" and other "forms of advertising", for public officers in no way connected with any Executive Department, is one which at some time must be decided. The Government Printing Office is no part of, nor is it in any way connected with, any Executive Department. The manner of advertising for proposals for paper is regulated by sections 3767 and 3768, as amended by act of January 25, 1876 (19 Stat., 2), but not the compensation for publishing advertisements. The same may be said of advertisements for some other materials (Act July 31, 1876, 19 Stat., 105; Act February 1, 1878, 20 Stat., 22). The same may be said of advertisements for supplies for the two Houses of Congress (Rev. Stat., 65, 66, 67, and amendment of sections 65, 67, by Act February 18, 1875, 18 Stat., 316). And so of executive proclamations (Act July 31, 1876, 19 Stat., 105). That clause of section 853 of the Revised Statutes which prescribes compensation "for publishing any notice * * * required by law, or the lawful order of any * * * person" is sufficiently comprehensive to include advertisements for material for the Government Printing Office or supplies for Congress (15 Op. Att.-Gen., 595; *Id.*, 633). So the expression, "all advertisements * * * ordered for publication * * * by any executive officer of the United States," as found in section 3823, is equally comprehensive, as applied in the ten States therein named. But the act of June 20, 1878, properly construed, prescribes compensation for all these forms of advertising. The spirit, equity and purpose of the act require this construction. Its language is not necessarily limited to the *Executive Departments*. Statutes intended to apply only to these, generally use the expression, "Executive Departments." (Rev. Stat., Title IV, p. 26; secs. 3824, 3826, 3828; Crowley's case, 3 Lawrence, Compt. Dec., 360.)

In this act Congress was dealing with the compensation to be paid generally for advertisements in the executive administration of the Government.

"The costs of advertising in informations *in rem* under the internal

revenue laws," in cases pending in the courts of the United States in Kentucky, are regulated by section 853 of the Revised Statutes.*

The claim will be disposed of in accordance with the principles herein set forth.

TREASURY DEPARTMENT,

First Comptroller's Office, September 1, 1884.

* This opinion was furnished to the United States Attorney at Louisville, who, on the 16th September, 1884, by letter to the First Comptroller, said that the Circuit Court of the United States at Louisville this day "disallowed the accounts [of this class] presented, but considered it unnecessary to file a written opinion as your [the Comptroller's] opinion was exhaustive of the subject."

The following is inserted to present in one view some of the statutes referred to in the following opinion:

The Revised Statutes (second edition, 1878) contain the following:

Publication of "SEC. 79. After the fourth day of March, eighteen hundred and seventy-five, [no money shall be paid from the Treasury for] the publication of the laws in newspapers [shall cease.]"

8 May, 1872, c. 140, s. 1, v. 17, p. 66. 20 June, 1874, c. 328, v. 18, p. 90. 20 June, 1874, c. 334, v. 18, p. 115. 23 June, 1874, c. 456, s. 4, v. 18, p. 232. 18 Feb., 1875, c. 80, v. 18, p. 317.

Printers' fees.

"PRINTERS' FEES.

26 Feb., 1853, c. 80, s. 3, v. 10, p. 168. 6 Op. 502; 15 Op. 282; 15 Op. 594; 15 Op. 633. "SEC. 853. For publishing any notice, or order, required by law, or the lawful order of any court, Department, Bureau, or other person, in any newspaper, except as mentioned in sections thirty-eight hundred and twenty-three, thirty-eight hundred and twenty-four, and thirty-eight hundred and twenty-five, Title, 'PUBLIC PRINTING, ADVERTISEMENTS, AND PUBLIC DOCUMENTS,' forty cents per folio for the first insertion, and twenty cents per folio for each subsequent insertion. The compensation herein provided shall include the furnishing of lawful evidence, under oath, of publication, to be made and furnished by the printer or publisher making such publication."

Meaning of folio. "SEC. 854. The term folio, in this chapter, shall mean one hundred words, counting each figure as a word. When there are over fifty and under one hundred words, they shall be counted as one folio; but a less number than fifty words shall not be counted, except when the whole statute, notice, or order contains less than fifty words."

Clerk of House to select newspapers in certain States to publish law SEC. 3823. The Clerk of the House of Representatives shall select in Virginia, South Carolina, North Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas, and Arkansas, one or more newspapers, not exceeding the number allowed by law, in which such treaties and

2 March, 1867, c. 167, s. 7, v. 14, p. 466. laws of the United States as may be ordered for publication in newspapers according to law shall be published, and in some one or more of which so selected all such advertisements as may be ordered for publication in said districts by any United States court or judge thereof, or

29 March, 1867, c. 13, s. 2, v. 15, p. 7. by any officer of such courts, or by any executive officer of the United

18 Feb., 1875, c. 80, v. 18, p. 316. States, shall be published, the compensation for which, and other terms of publication, shall be fixed by said Clerk at a rate not exceeding two dollars per page for the publication of treaties and laws, and not exceeding one dollar per square of eight lines of space, for the publication of advertisements, the accounts for which shall be adjusted by the proper accounting officers, and paid in the manner now authorized by law in the like cases. [See §§ 79, 204.]

Heads of Departments and judges to be notified, and to publish only in such newspapers. "SEC. 3824. The Clerk shall notify each head of the several Executive Departments, and each judge of the United States courts therein, of the papers selected by him in accordance with the provisions of the preceding section, and thereafter it shall be the duty of the several executive officers charged therewith to furnish to such selected papers only, an

2 Mar., 1867, c. 167, s. 7, v. 14, p. 466. authentic copy of the publications to be made as aforesaid; and no money appropriated shall be paid for any publications or advertisements here-

29 Mar., 1867, c. 13, s. 2, v. 15, p. 7. after to be made in said districts, nor shall any such publication or advertisement be ordered by any department or public officer otherwise than as herein provided. [See § 853.]

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"SEC. 3825. The rates fixed in section thirty-eight hundred and twenty-three, to be paid for the publication of the treaties and laws of the United States in the States therein designated, shall also be paid for the same publications in all the States not designated in that section. [See § 79.]

"SEC. 3826. All advertisements, notices, and proposals for contracts for all the Executive Departments of the Government, and the laws passed by Congress and executive proclamations and treaties to be published in the District of Columbia, Maryland, and Virginia, shall hereafter be advertised by publication in the three daily papers published in the District of Columbia having the largest circulation, one of which shall be selected by the Clerk of the House of Representatives, and in no others. The charges for such publications shall not be higher than such as are paid by individuals for advertising in said papers, and the same publications shall be made in each of the said papers equally as to frequency: *Provided*, That no advertisement to any State, District, or Territory, other than the District of Columbia, Maryland, or Virginia, shall be published in the papers designated, unless at the direction first made of the proper head of a Department: *And provided further*, That this section shall not be construed to allow a greater compensation for the publication of the laws passed by Congress and executive proclamations and treaties in the papers of the District of Columbia than is provided by law for such publications in other papers.

"By statute of March 3, 1875, c. 128, s. 1, v. 18, p. 342, it is provided 'that hereafter the mail lettings for the States of Maryland and Virginia and for the District of Columbia shall be advertised in not more than one newspaper published in the District of Columbia, and at prices satisfactory to the Postmaster-General, not exceeding the customary rates paid in the city of Washington for ordinary commercial advertisements;' and so much of this section as refers to the publication of advertisements in newspapers than is provided by the act above mentioned. (See Rev. Stats., s. 3941.)

"SEC. 3827. No payment shall be made to any newspaper published in the District of Columbia for advertising any other mail routes than those in Virginia and Maryland.

"SEC. 3828. No advertisement, notice, or proposal for any Executive Department of the Government, or for any Bureau thereof, or for any office therewith connected, shall be published in any newspaper whatever, except in pursuance of a written authority for such publication from the head of such Department; and no bill for any such advertising, or publication, shall be paid, unless there be presented, with such bill, a copy of such written authority.

"SEC. 3941. Before making any contract for carrying the mail, other than those hereinafter excepted, the Postmaster-General shall give public notice by advertising once a week for six weeks in one or more, not exceeding five, newspapers published in the State or Territory where the service is to be performed, one of which shall be published at the seat of government of such State or Territory; and such notice shall describe the route, the time at which the mail is to be made up, the time at which it is to be delivered, and the frequency of the service; and the Postmaster-General shall direct, by special order in each case, the newspapers in which mail-lettings, or other proposals relative to the business of his Department, shall be advertised, and no publisher shall be paid for such advertisements without having been requested by the Postmaster-General to publish the same. [See § 3827.]"

The statutes, enacted since the revision, contain the following provisions:

Act of June 23, 1874—18 Stat., 231:

"SEC. 4. That the Revised Statutes of the United States shall not be published by the United States in any newspaper, anything in existing laws to the contrary notwithstanding."

Act Feb. 18, 1875—18 Stat., 316:

¶ That for the purpose of correcting errors and supplying omissions in the act entitled 'An act to revise and consolidate the statutes of the United States in force on the first day of December, anno Domini one thousand eight hundred and seventy-three,' so as to make the same

Rates of pay in all the States for publishing laws.

29 Mar., 1867, c. 13, s. 2, v. 15, p. 8.

Advertisements in Washington, D. C.

2 Mar., 1867, c. 167, s. 10, v. 14, p. 467.

29 Mar., 1867, c. 13, s. 2, v. 15, p. 7.

20 July, 1868, c. 176, ss. 2, 4, v. 15, p. 110.

18 Feb., 1875, c. 18, v. 18, p. 316.

Repealed by stat. 3 Mar., 1875, c. 128, v. 18, p. 342.

31 July, 1876, c. 246, v. 19, p. 105, 15 Op., 504.

15 Op., 282.

Mail-route advertisements in D. C.

3 Mar., 1873, c. 231, s. 1, v. 17, p. 557.

No advertisement without authority.

15 July, 1870, c. 292, s. 2, v. 16, p. 308.

16 Op., 616.

Advertising for proposals.

8 June, 1872, c. 335, s. 243, v. 17, p. 313.

truly express such laws, the following amendments are hereby made therein:

- R. S., 79, p. 14. Section seventy-nine is amended by striking out, in the second line, the words, 'no money shall be paid from the Treasury for,' and adding, at the end of the section, the words 'shall cease.'"

Act March 3, 1875—18 Stat., 342:

- 15 Op. 282. "That hereafter the mail-lettings for the States of Maryland and Virginia and for the District of Columbia shall be advertised in not more than one newspaper published in the District of Columbia, and at prices satisfactory to the Postmaster-General, not exceeding the customary rates paid in the city of Washington for ordinary commercial advertisements; and so much of section three thousand eight hundred and twenty-six of the Revised Statutes of the United States as refers to the publication of advertisements in newspapers be, and the same is hereby, repealed.

R. S., s. 3826, p. 754, repealed in part.

"The Postmaster-General shall cause an advertisement of the mail-lettings of each State and Territory to be posted up in each post-office therein, to be posted conspicuously for at least sixty days before the time of such letting."

Act July 12, 1876—19 Stat., 78:

"That the Postmaster-General shall cause advertisements of all general mail-lettings of each State and Territory to be conspicuously posted up in each post office in the State and Territory embraced in said advertisements for at least sixty days before the time of such general letting; and no other advertisement of such lettings shall be required; but this provision shall not apply to any other than general mail-lettings."

Act July 31, 1876—19 Stat., 105:

"That all executive proclamations, & all treaties required by law to be published, shall be published in only one newspaper the same to be printed and published in the District of Columbia and to be designated by the Secretary of State and in no case of advertisement for contracts for the public service shall the same be published in any newspaper published and printed in the District of Columbia unless the supplies or labor covered by such advertisement are to be furnished or performed in said District of Columbia."

Act May 17, 1878—20 Stat., 61, 62:

1876, ch. 160.
19 Stat., 129.

"That before making any contract for inland mail transportation, other than by railroads and steamboats, except for temporary service, as provided for in an act approved August eleventh, eighteen hundred and seventy-six, amendatory of sub-sections two hundred and forty-six and two hundred and fifty-one of section twelve of an act approved June twenty-third, eighteen hundred and seventy-four, the Postmaster-General shall cause to be published, in not exceeding ten newspapers published in the State or Territory in which such service is to be let, one of which shall be published at the seat of government of such State or Territory, once a week for six consecutive weeks, preceding the time of letting, a notice in displayed type, not to exceed six inches of space in one column of a newspaper

and no other advertisement of miscellaneous lettings shall be required:

SEC. 4. Hereafter all advertisements, notices, proposals for contracts, and all other forms of advertising required by law for the Post Office Department may be paid for at a price not to exceed the commercial rates charged to private individuals with the usual discounts, such rates to be ascertained from sworn statements to be furnished to the Postmaster-General by the proprietors of the newspapers proposing to so advertise: *Provided*, That all advertising in newspapers since the tenth day of April, eighteen hundred and seventy-seven, shall be audited and paid at like rates. But the Postmaster-General may secure lower terms at special rates, whenever the public interest requires it."

Act June 20, 1878—20 Stat., 216:

"That hereafter all advertisements, notices, proposals for contracts, and all forms of advertising required by law for the several departments of the government may be paid for at a price not to exceed the commercial rates charged to private individuals, with the usual discounts; such rates to be ascertained from sworn statements to be fur-

nished by the proprietors or publishers of the newspapers proposing so to advertise: *Provided*, That all advertising in newspapers since the tenth day of April, eighteen hundred and seventy-seven, shall be audited and paid at like rates; but the heads of the several departments may secure lower terms at special rates whenever the public interest requires it."

Act June 12, 1879—21 Stat., 11:

"That in cases where special service has already been placed on new routes, the Postmaster-General may, in his discretion, extend such service until the time when service can be obtained by advertisement, not exceeding in any case one year. And whenever an accepted bidder shall fail to enter into contract, or a contractor on any mail-route shall fail or refuse to perform the service on said route according to his contract, or when a new route shall be established or new service required, or when, from any other cause, there shall not be a contractor legally bound or required to perform such service, the Postmaster-General may make a temporary contract for carrying the mail on such route, without advertisement, for such period as may be necessary, not in any case exceeding one year, until the service shall have commenced under a contract made according to law. And any provision of statute in conflict with this provision is hereby repealed."

Act January 21, 1881—21 Stat., 317:

"CHAP. 25.—An act to regulate the award of and compensation for public advertising in the District of Columbia. That all advertising required by existing laws to be done in the District of Columbia by any of the departments of the government shall be given to one daily and one weekly newspaper of each of the two principal political parties and to one daily and one weekly neutral newspaper: *Provided*, That the rates of compensation for such service shall in no case exceed the regular commercial rates of the newspapers selected; nor shall any advertisement be paid for unless published in accordance with section thirty-eight hundred and twenty-eight of the Revised Statutes.

R. S. 3828.

SEC. 2. All laws or parts of laws inconsistent herewith are hereby repealed."

Act March 1, 1881—21 Stat., 374:

"And hereafter the Postmaster-General shall cause advertisements of all general mail-lettings of each State and Territory to be conspicuously posted in each post-office in the State and Territory embraced in said advertisements for at least sixty days before the time of such general lettings; and no other advertisement of such lettings shall be required; but this provision shall not apply to any other than general mail-lettings. And whenever it shall become necessary to employ temporary service on any mail route, it shall be the duty of the Postmaster-General to advertise for bids, or proposals, for such service by posting notices in the post offices at the termini of such route and upon a bulletin-board in a public place in the Post-Office Department building at Washington in the District of Columbia for at least ten days prior to such letting."

In Richardson's "Supplement to the Revised Statutes," including the "legislation of 1874-1881, the 43d, 44th, 45th, and 46th Congresses," sections of the Revised Statutes are inserted in the table of such sections "altered, affected, or repealed" as follows:

Sec. 79, by acts June 20, 1874—18 Stat., 85; June 23, 1874—18 Stat., 231; February 18, 1875—18 Stat., 316. See Richardson, 44, 95, 137.

Sec. 853, by act June 20, 1878—20 Stat., 206. See Richardson, 343.

Sec. 854, by act June 20, 1878—20 Stat., 206. See Richardson, 382.

Sec. 3823, by act June 20, 1878—20 Stat., 206. See Richardson, 382.

Sec. 3826, by acts February 18, 1875—18 Stat., 316; March 3, 1875—18 Stat., 340; July 12, 1876—19 Stat., 78; July 31, 1876—19 Stat., 102; May 17, 1878—20 Stat., 61, 62, Secs. 1, 4; June 20, 1878—20 Stat., 206; January 21, 1881—21 Stat., 317. See Richardson, 137, 154, 224, 234, 323, 324, 382, 589.

Sec. 3827, by act June 23, 1874—18 Stat., 231. See Richardson, 95.

Sec. 3941, by acts March 3, 1875—18 Stat., 340; July 12, 1876—19 Stat., 78; May 17, 1878—20 Stat., 61; June 12, 1879—21 Stat., 11; June 9, 1880—21 Stat., 170; March 1, 1881—21 Stat., 374. See Richardson, 154, 224, 323, 491, 542, 598, 599. See 15 Op. Att.-Gen., 262; *Id.* 594.

IN THE MATTER OF CLAIMS FOR ONE MONTH'S EXTRA COMPENSATION UNDER THE SUNDRY CIVIL APPROPRIATION-ACT OF JULY 7, 1884 (23 STAT., 226), AND UNDER THE ACTION OF THE HOUSE OF REPRESENTATIVES AFFECTING SUCH CLAIMS.—FAY'S CASE.

The act of March 3, 1883 (22 Stat., 536), making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year which ended June 30, 1884, makes an appropriation to pay "for thirty-two clerks to committees [of the House], at six dollars each per day," and the sundry civil appropriation-act of July 7, 1884 (23 Stat., 226), provides that all officers and employees of either branch of Congress "who were employed on the third day of December, eighteen hundred and eighty-three, or *subsequently by resolution* of either House, and who, prior to the fifteenth day of May, eighteen hundred and eighty-four, *ceased to be so employed*, shall be paid one month's extra pay." December 24, 1883, John B. Fay was appointed by the Committee on Railways and Canals of the House as clerk of said committee, took the oath of office accordingly, and continued in said employment until March 31, 1884, when it ceased. January 8, 1884, a resolution of the House directed the Committee on Accounts to designate and report to the House the committees which should be allowed clerks under said act of March 3, 1883 (22 Stat., 536). January 17, 1884, the Committee on Accounts made a report to the House, that the thirty-two clerks provided for in the act of March 3, 1883 (22 Stat., 536), should be distributed to committees specified, including one clerk for said Committee on Railways and Canals; and the House adopted the report.

Held:

1. Said Fay was, within the meaning of the act of July 7, 1884 (23 Stat., 226), "*employed*" "*by resolution*" of the House.
2. One purpose of this act was, to provide a month's extra pay for clerks of committees employed by *authority* of the House, in whatever form lawfully expressed.
3. The claimant is, therefore, entitled to one month's extra compensation.
4. *Quære*, Whether a clerk of a committee of either House of Congress is entitled to compensation, until he has been appointed *by authority of the proper House*, and has thereafter taken the oath of office?

The act of March 3, 1883 (22 Stat., 536), making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year ending June 30, 1884, makes, among others, an appropriation "for thirty-two clerks to committees [of the House], at six dollars each per day during the session, forty thousand eight hundred and ninety-six dollars." December 24, 1883, Hon. John G. Carlisle, Speaker of the House of Representatives, announced the appointment of the House committees, among which was the Committee on Railways and Canals. On the same day John B. Fay was by that committee appointed its clerk, the chairman of the committee gave him a certificate of his appointment, and he took the oath of office. January 8, 1884, the following resolution was adopted by the House:

"Resolved, That the Committee on Accounts be, and it is hereby authorized and directed to designate the committees which in the judg-

ment of the said Committee on Accounts should be allowed clerks for the present Congress under the legislative, judicial, and executive appropriation bill for the year ending June 30, 1884, and to report to the House without delay, for its action thereon."

January 17, 1884, the Committee on Accounts of the House, submitted the following report, which was adopted by the House, viz:

"The thirty-two clerks provided for in the bill referred to in the above resolution are distributed according to the appended schedule, to wit: To the Committee on Elections, a clerk; to the Committee on Banking and Currency, a clerk; to the Committee on Coinage, Weights, and Measures, a clerk; to the Committee on Foreign Affairs, a clerk; to the *Committee on Naval Affairs*, a clerk; to the Committee on the Post-Office and Post-Roads, a clerk; to the Committee on the Territories, a clerk; to the *Committee on Railways and Canals*, a clerk; to the Committee on Mines and Mining, a clerk; to the Committee on Public Buildings and Grounds, a clerk, who shall also act as clerk of the Committee on Expenditures on Public Buildings; to the Committee on Pacific Railroads, a clerk; to the Committee on Levees and Improvements of the Mississippi River, a clerk; to the Committee on the Library, a clerk, who shall also act as clerk to the Committee on Education; to the Committee on Labor, a clerk; to the Committee on the Militia, a clerk, who shall also act as clerk to the Committee on Mileage; to the Committee on Patents, a clerk; to the Committee on Pensions, a clerk; to the Committee on Private Land Claims, a clerk; to the Committee on Revision of the Laws, a clerk, who shall also act as Clerk to the Committee on Manufactures; to the Committee on Expenditures in the State Department, a clerk, who shall also act as clerk to the Committee on Expenditures in the Treasury Department; to the Committee on Expenditures in the War Department, a clerk, who shall also act as clerk to the Committee on Expenditures in the Navy Department; to the Committee on Expenditures in the Post-Office Department, a clerk, who shall also act as clerk to the Committee on Expenditures in the Interior Department; to the Committee on Expenditures in the Department of Justice, a clerk; to the Committee on Accounts, a clerk; to the Committee on Printing, a clerk; to the Committee on Enrolled Bills, a clerk; to the Committee on Reform in the Civil Service, a clerk; to the Committee on American Shipbuilding and Ship-owning Interests, a clerk; to the Committee on Law respecting Election of President and Vice-President, a clerk; to the Committee on Payment of Pensions, Bounty, and Back Pay, a clerk; to the Committee on Ventilation and Acoustics, a clerk, who shall also act as clerk to the Committee on the Public Health; and to the Committee on the Alcoholic Liquor Traffic, a clerk."

Said employment of Fay continued until March 31, 1884, when it ceased.

The act of July 7, 1884 (23 Stat., 194, 226), making appropriations for sundry civil expenses of the Government for the fiscal year ending June 30, 1885, contains a provision, as follows:

"That all officers and employees of the Senate and House, including the Capitol police, who were *employed* on the third day of December, eighteen hundred and eighty-three, *or subsequently by resolution of either House*, and who prior to the fifteenth day of May, eighteen hundred and eighty-four, ceased to be so employed, shall be paid a sum equal to one

month's pay at the rate they were severally receiving on the third day of December, eighteen hundred and eighty-three, or subsequently, as above provided; and an amount sufficient for this purpose is hereby appropriated out of any money in the Treasury not otherwise appropriated, and the same shall be immediately available: *Provided*, That but one month's allowance shall be paid in any case, and the same shall not be paid to any person who shall receive one month's extra pay under the preceding paragraph."

July 25, 1884, Hon. John B. Clark, jr., clerk and disbursing officer of the House of Representatives presented to the First Comptroller for his opinion thereon the question, whether Fay is entitled to one month's extra pay under the appropriation made by said act of July 7, 1884 (23 Stat., 226). The same question arises upon facts of like character and effect as to the rights of John B. O'Connor, late clerk of the Committee on Naval Affairs of the House of Representatives, and also of other employés of the House.

Felix Brannigan, esq., in behalf of O'Connor, submitted a brief, as follows:

"The act of July 7, 1884, applies to officers and employés of the Senate and House of Representatives, including the Capitol Police, who were employed on the third day of December, 1883, or subsequently, *by resolution* of either House, and who, prior to the 15th of May, 1884, ceased to be so employed.

"The only question in this case is, as to whether O'Connor was employed as such clerk 'by resolution of either House.'

"I. He was employed by authority of a resolution of the House of Representatives.

"1. There are two modes by which clerks may be employed on House committees:

"*First*, by statutory authority allowing clerks to certain committees; as, for example, the clerks to the House Committees on Ways and Means, and Appropriations, and a few other standing committees.

"*Second*, by resolution of the House, as in the case of other standing committees, and select committees, for which no law has provided clerkships.

"These are the only lawful modes for the employment of such clerks.

"2. The act of March 3, 1883, made an appropriation available for the payment of 32 clerks to committees; but it will not be argued that any House committee could, of its own authority alone, employ a clerk or authorize another committee to employ a clerk who would be chargeable to that appropriation. No statute conferred such authority on any committee; hence, the House alone had power to authorize the employment of these clerks. The clerk of the Committee on Naval Affairs, and the clerks of the other standing committees, who were not annual clerks, were paid from this appropriation during the first session of the present (48th) Congress. These clerks were, pursuant to the House resolution of January 8, 1884, either lawfully or unlawfully paid. None of them were appointed as to an office created by statute. The act appropriating pay for 32 session clerks vested no authority in any committee to employ a clerk. At the discretion of the House all, or a less number might be employed. If there was any authority for their employment, that authority was vested solely in the House of Representatives.

"3. No committee of the House has ever employed a clerk without

the authority of the House or of a statute. The Committee on Accounts could grant no power to any other committee of the House to employ a clerk. Under the resolution of the 8th of January, the function of the Committee on Accounts was to determine the standing committees which were in need of the assistance of clerks during the session. This being determined, the authority to employ the clerks came, not from the Committee on Accounts, but from the House of Representatives by its resolution.

"(1) The resolution of January 8th was the authority in this case, and the action of the Committee on Accounts was the mode by which the will of the House, as expressed in that resolution, was to be executed. To hold that Mr. O'Connor was not 'employed * * * by resolution of either House' within the meaning of these words as used in the sundry civil act of July 7, 1884, would be 'to stick in the bark'—*qui hæret in litera hæret in cortice*.

"(2) We have in this case a resolution of the House in regard to the payment of session clerks who were not employed during the whole period of the session, thus meeting the very condition laid down in the sundry civil act. The purpose of Congress in passing this act was to put these employés on an equal footing with all the other session employés, with respect to the granting of one month's extra pay in addition to all other wages earned by them during the session. According to a liberal custom, or policy, on the part of Congress, an extra month's pay was granted to all other officers and employés of both Houses by appropriate words in the paragraph preceding that one which appropriates an extra month's pay for the officers and employés who are employed between December 3, 1883, and May 15, 1884. The preceding paragraph covered the case of officers and employés borne on the annual or session rolls on the 30th of June, 1884, no matter how short the time they may have been employed. The grant of an extra month's pay made in it could not apply to officers and employés whose names had ceased to be borne on the rolls prior to June 30, 1884. The intention of Congress is, therefore, plainly shown by this circumstance, and by the provision making an appropriation for those officers and employés who could not be paid under that paragraph of the bill.

"(3) It would be impossible to decide in this case that Mr. O'Connor, and the other clerks interested, were not employed 'by resolution' of the House of Representatives, without at the same time having to hold that they were not legally employed at any time during the session."

OPINION BY WILLIAM LAWRENCE, *First Comptroller*.

Fay was not "employed on the third day of December, eighteen-hundred and eighty-three." His claim for the month's extra pay rests on the construction to be given to the words found in the sundry civil act of July 7, 1884 (23 Stat., 226), "or *subsequently* by resolution of either House." The resolution of January 8, 1884, gives no authority to employ any person as clerk. It merely directs the Committee on Accounts to designate, and report to the House, what committees should be allowed clerks, "for the present [48th] Congress," under the legislative, executive, and judicial appropriation-act of March 3, 1883 (22 Stat., 836).

A strict adherence to the *mere letter* of the act of July 7, 1884, would deny the right of the claimant to the extra compensation, since he was not literally employed under a *resolution*.

The purpose of the said act of July 7, 1884, was, to give a month's extra pay to the persons who came within its terms—who were employed, as it says, “by resolution of either House”; but this evidently means by *authority* of either House. When the report of the Committee on Accounts was adopted, then the *authority* of the House was given for the employment of clerks to the committees in accordance with the recommendation of that report. This action was equivalent to a resolution of the House. It was a declaration of the will of the House; and that is all that a resolution could accomplish.

The provision of the act of July 7, 1884, authorizing extra pay did not, as it first passed the House, contain the words, “or *subsequently* by *resolution* of either House.” These words were inserted by way of amendment in the Senate; and the evident purpose of this amendment was, to so word the provision that it might embrace all the employés within its terms. Upon the principle stated, the claimant, O'Connor, is entitled to a month's extra pay.

It may be stated in this connection, that the custom has been to pay clerks of committees who were appointed by the committees, even before the passage of any resolution, or other expression of the House, designating the committees to which clerks should be allowed. It may be difficult to perceive how this usage finds any sanction in law. The House is authorized to choose its “speaker and other officers” and employés (Const. U. S., Art I, Sec. 2, par. 5). There is no statute which gives any committee authority to employ a clerk. A statute could give such authority; but, so far as the clerks of the committees of the present House of Representatives are concerned, no statute has done so. It would seem advisable that any doubt in respect to the present mode of appointing committee clerks—annual as well as session clerks—should be set at rest by an act of Congress, or by Rule or Resolution of the House, if the latter should be deemed the appropriate action.

Rule Ten of the Rules of the House of the Forty-sixth Congress, which has been in force during other Congresses, provides that:—

“The Chairman [of each Committee] shall appoint the Clerk of his committee, subject to its approval, who shall be paid at the public expense, *the House having first provided therefor.*”

The Rules of the House of one Congress are not in force during a subsequent Congress, unless, or until, adopted by such subsequent House. Nor is a clerk of a committee, unless by express provision, entitled to compensation, until he takes the oath of office under and by *authority* of the House (Schroeder's Case, *ante*, 374).

The claimants are each entitled to one month's extra pay.

TREASURY DEPARTMENT,

First Comptroller's Office, August 13, 1884.

IN THE MATTER OF THE RIGHT OF A DISBURSING CLERK IN THE TREASURY DEPARTMENT, WHO DISBURSES SALARIES, &c., IN THE BUREAU OF ENGRAVING AND PRINTING, TO THE COMPENSATION PROVIDED BY STATUTE AS "ADDITIONAL TO ONE CLERK AS DISBURSING CLERK" IN SAID BUREAU.—DISBURSING CLERK'S CASE.

Sections 235 and 176 of the Revised Statutes, in connection with the act of March 3, 1875 (18 Stat., 396, sec. 2), provide for two Disbursing Clerks in the Treasury Department, with authority to pay compensation of all officers and employes therein. The legislative, &c., appropriation-act of March 3, 1881 (21 Stat., 394), by appropriating for clerks in the Bureau of Engraving and Printing with a provision for "additional to one clerk as disbursing clerk, two hundred dollars," gave the Secretary of the Treasury authority to require a clerk in said Bureau to disburse money to pay salaries, &c., arising therein; and similar appropriation-acts have been since annually passed.

In June, 1884, the Disbursing Clerk in the Bureau of Engraving and Printing resigned his position as such; and the Secretary of the Treasury then directed one of the general Disbursing Clerks of the Treasury Department to pay salaries and expenses in that Bureau. The latter Disbursing Clerk, after performing these services, asked that payment be made to him of the \$200 annually appropriated as aforesaid.

Held :

1. A Disbursing Clerk of the Treasury Department, who disburses salaries, &c., of clerks and employes in the Bureau of Engraving and Printing, is not entitled to any part of the two hundred dollars appropriated as "additional [compensation] to one clerk as disbursing clerk" in said Bureau.
2. Construction given to sections 166, 170, 176, 235, and 1764 of the Revised Statutes, and to the act of March 3, 1881 (21 Stat., 394), and other similar appropriation-acts since annually passed with like provisions as to salaries in the Bureau of Engraving and Printing.

The legislative, executive, and judicial appropriation-act of March 3, 1883, (22 Stat. 531-542) provides that:—

"The following sums be, and the same are hereby, appropriated, out of any money in the Treasury not otherwise appropriated, in full compensation for the service of the fiscal year ending June thirtieth, eighteen hundred and eighty-four, for the objects hereinafter expressed, namely:—"

It then specifies under various general captions and sub-captions the purposes for which appropriations are made, and the amounts for each. After sundry appropriations under the general caption, "TREASURY DEPARTMENT," are a sub-caption and provision as follow:

"BUREAU OF ENGRAVING AND PRINTING.—For chief of bureau, four thousand five hundred dollars; one assistant, two thousand two hundred and fifty dollars; accountant, two thousand dollars; one stenographer, one thousand six hundred dollars; one clerk of class three; one clerk of class two; four clerks of class one; one clerk, one thousand dollars; addi-

tional to one clerk as disbursing clerk, two hundred dollars; three copyists, at nine hundred dollars each; two assistant messengers, and four laborers; in all, twenty-six thousand one hundred and thirty dollars."

Under this a clerk in the Bureau of Engraving and Printing was charged with the duty of making disbursements to pay the salaries, &c., of officers and employes in that Bureau; he gave a disbursing bond, made the disbursements, and received the regular salary of a clerk, and, in equal monthly instalments for the fiscal year, the proper proportion of the two hundred dollars additional for services as Disbursing Clerk. In June, 1884, he resigned the position as Disbursing Clerk for said Bureau. The legislative, &c., appropriation-act of July 7, 1884 (23 Stat., 171), makes an appropriation for the fiscal year ending June 30, 1885, for the Bureau of Engraving and Printing, in the same form as that in the act of March 3, 1883 (22 Stat., 542).

During the year 1883, Thomas J. Hobbs was, and since has been, one of the two general Disbursing Clerks "in the Department of the Treasury," by virtue of sections 235 and 176 of the Revised Statutes, and the act of March 3, 1875 (18 Stat., 396, Sec. 2). Upon the resignation, in June, 1884, of the position of Disbursing Clerk for the Bureau of Engraving and Printing, by the officer holding the same, the Secretary of the Treasury directed said general Disbursing Clerk of the Treasury Department to pay salaries, &c., in that Bureau. October 18, 1884, Mr. Hobbs, after performing the services, by letter, asked the Secretary of the Treasury to "direct the payment to be made" to him (said Hobbs) of the salary of two hundred dollars authorized for the clerk in the Bureau of Engraving and Printing for making disbursements therein. The letter says:

"Objection may be made that Congress intended that the appointment of disbursing clerk and the compensation should go to a clerk on the rolls of the Bureau. Perhaps so, but there is nothing in the law prohibiting payment to any clerk of the Treasury Department who may have received the appointment and performed the services. Moreover, section 166 of the Revised Statutes provides as follows: 'Each head of a Department may from time to time alter the distribution among the various Bureaus and offices of his Department, of the clerks allowed by law, as he may find it necessary and proper to do.'"

October 27, 1884, the Acting Secretary of the Treasury referred this letter to the First Comptroller, "for his opinion as to whether under the law the request of Mr. Hobbs can be granted."

OPINION BY WILLIAM LAWRENCE, *First Comptroller.*

It is entirely clear that the claimant is not entitled to the compensation for which he asks. He is one of the two general Disbursing Clerks in the Treasury Department; and his compensation for services as such is prescribed by the act of July 7, 1884 (23 Stat., 167). He was lawfully required by the Secretary of the Treasury to make disbursements for the

Bureau of Engraving and Printing. He is a general Disbursing Clerk for the whole Treasury Department. There was no authority for a clerk of the Bureau of Engraving and Printing to disburse money therefor, until the act of March 3, 1881 (21 Stat., 394), which is copied in the same words in the similar appropriation-acts of March 3, 1883 (22 Stat., 542), and July 7, 1884 (23 Stat., 171). Under these and similar appropriation-acts such clerk might be employed, or not, in the discretion of the Secretary of the Treasury. These acts are not negative in terms or by implication, and, hence, do not operate as a repeal of so much of the prior statutes as authorizes the general Disbursing Clerks of the Treasury Department to make disbursements for the Bureau of Engraving and Printing (Bishop, *Written Laws*, 153; Maxwell, *Statutes*, 2d ed., 189). The authority of any clerk in the Bureau of Engraving and Printing to make disbursements therein is merely ancillary. The Secretary of the Treasury may dispense with all clerks in that Bureau (Rev. Stat., 166). Yet, it is not to be supposed that Congress intended to leave other officers therein without the means of obtaining payments of their respective salaries (Senate-Disbursement case, 2 Lawrence, *Compt. Dec.*, 2d ed., 404).

Mr. Hobbs is a Disbursing Clerk employed in the Treasury Department at an annual salary. If it be said, that, in making disbursements for the Bureau of Engraving and Printing, he is performing the duties of a clerk therein by law charged with the duty of making such disbursements, still, no compensation can be paid to him for said services. The sum of two hundred dollars mentioned in the provision quoted from the act of March 3, 1883 (22 Stat., 542), was expressly, and in clear terms, for a *clerk in the Bureau of Engraving and Printing*; and so is the like appropriation made by the act of July 7, 1884 (23 Stat., 171), for the fiscal year ending June 30, 1885. Sections 170 and 1764 of the Revised Statutes prohibit the payment to any clerk of "compensation for extra services," or for "the discharge of duties which belong to any other officer or clerk." There is no ground upon which the claim made in this case can be supported.

The Secretary will be so advised.

TREASURY DEPARTMENT,

First Comptroller's Office, November 1, 1884.

IN THE MATTER OF THE RIGHT OF A NATIONAL BANK EXAMINER TO PAYMENT OF "HIS NECESSARY EXPENSES," "WHEN * * * AWAY FROM HIS * * * [RESIDENCE] AS A WITNESS FOR THE GOVERNMENT" UPON THE REQUEST OF A UNITED STATES DISTRICT ATTORNEY.—ELLIS'S CASE.

1. A National Bank Examiner is not an "*officer* of the United States."
2. Such Examiner is not entitled to payment, under section 850 of the Revised Statutes, of "his necessary expenses," "when * * * away from his * * * [residence] as a witness for the Government" upon the request of a United States District Attorney.
3. *Langford's case* (2 Lawrence, Compt. Dec., 2d ed., 271) re-affirmed.
4. The *general* terms of an appropriation-act are to be construed in subordination to the *general* limitations imposed by existing and qualifying statutes.

In August, 1884, R. Ellis, Jr., a National Bank Examiner (Rev. Stat., 5240), went from his residence in Cincinnati in the Southern District of Ohio to Cleveland in the Northern District, not in obedience to judicial process, but on the telegraphic request of the District Attorney of the United States for the latter District, to give testimony in behalf of the Government, and did so, in the case of the United States *v.* Northway and others, indicted in the Circuit Court of the United States of said Northern District for willfully misapplying National Bank funds (Rev. Stat., 5209). The hotel and traveling expenses of said Ellis amounted to \$32.50, a bill for which was approved by the acting Attorney-General, August 26, 1884, for payment by the United States. October 31, 1884, the First Auditor made a report to the First Comptroller, disallowing payment of the claim; and it is now submitted for the latter officer's decision thereon.

DECISION BY WILLIAM LAWRENCE, *First Comptroller*.

The question presented in this case is in principle decided against the claimant herein, in *Langford's case* (2 Lawrence, Compt. Dec., 2d ed., 271), which is now re-affirmed. The statute provides that:

When any clerk, or other *officer* of the United States is *sent away* from his *place of business* as a witness for the Government, his *necessary expenses*, * * *, shall be * * * paid;" &c. (Rev. Stat., 850.)

It may be assumed for the present, that the *residence* of the witness in this case is, for the purpose now under consideration, "his place of business," though this does not affirmatively appear.

The claimant in this case is not an "*officer*," and, hence, is not within the statute. He is not within the *reason* of section 850 of the Revised Statutes. The statute gives mileage and *per-diem* compensation to witnesses who appear under judicial process. This is designed to make compensation for (1) *time* of service, and (2) for necessary *expenses* (Rev. Stat., 848, 1883). The *salary* of a "clerk or other officer" is included as compensation for *time of service*; and officers are generally

entitled to full salary, even when absent from official duty (Meigs's case, 4 Lawrence, Compt. Dec., 604, *note*; Clerk's Absence case, ante, 34). In view of this, section 850 of the Revised Statutes denies to clerks and salaried officers the right to receive the *per-diem* compensation and mileage of ordinary witnesses, but provides for the payment of necessary expenses.

The question has arisen, but has not been decided—whether section 850 of the Revised Statutes applies to any officer, except such a one as can by some superior officer lawfully be “sent away from his place of business,” as a clerk in an Executive Department may sometimes be (Rev. Stat., 161, 166, 183, 474; Swamp-Land case, 2 Lawrence, Compt. Dec., 2d ed., 136). It is possible that there may be some ground for holding that the words, “other officer,” are to be construed, upon the maxim, *noscitur à sociis*, with the word, “clerk,” and to be applied only to such officers as can by superior authority be “sent” away from their places of business. The claimant in this case was subject to judicial process to compel his attendance as a witness (Rev. Stat., 876; The Patapsco Ins. Co. v. Southgate *et al.*, 5 Pet., 616; Russell v. Ashley, Hempst., 546). The District Attorney had no authority to require the presence or testimony of the witness, except under such process. There is an appropriation for “expenses of the United States courts,” including expenses of “witnesses” and “of the prosecution for offenses committed against the United States” (Sundry Civil Appropriation-Act of July 7, 1884—23 Stat., 224). But such appropriation cannot be applied in paying the claim in this case; because the law expressly provides another mode of securing the attendance of, and of compensating, the witness, which must be deemed sufficient and exclusive (Rev. Stat., 848, 1833). When *express* provision is thus made for securing the attendance of, and for compensating, a witness, it must be deemed *exclusive*, unless specially otherwise provided by statute—*Expressio unius est exclusio alterius*. Such provision is, in effect, a limitation on the power to apply an appropriation for “witnesses,” for miscellaneous “expenses of courts,” or for the “prosecution” of offenses, in any mode, except that specially authorized. “The general terms of an appropriation law * * * should always be interpreted in subordination to the [general] limitations imposed by existing and qualifying enactments” (4 Op. Att.-Gen., 249; Swamp-Land case, 2 Lawrence, Compt. Dec., 2d ed., 138; 1 Greenleaf, Ev., § 294; 2 Wharton, Ev., §§ 969, 970; State *Ex. Rel.*, &c., v. Humphreys, Auditor, &c., 25 Ohio, St., 520; * Castro v. United States, 3 Wall., 46; Huidekoper's case (second), 3 Lawrence, Compt. Dec., 160; Osage-Land case, *Id.*, 368; State v. Stoll, 17 Wall., 425).

The claim presented is disallowed.

TREASURY DEPARTMENT,

First Comptroller's Office, November 7, 1884.

* This case seems to go even beyond the principle, in support of which it is cited above. It seems to overlook the principle that “a thing given in particular shall not be taken away by general words.”

IN THE MATTER OF A HYPOTHETICAL QUESTION PRESENTED BY A
UNITED STATES MARSHAL.—HYPOTHETICAL CASE.

1. The opinion of the First Comptroller may properly be given to an officer or agent of the United States as to his authority to make contracts for services or supplies, or to pay claims presented, when all the requisite facts are sufficiently stated.
2. But an opinion will not be given, involving the decision by the Comptroller of a mere hypothetical question or case.
3. The mode stated of computing necessary expenses of officers of the United States who attend court away from their places of business, as witnesses for the Government.

October 20, 1884, D. B. Russell, the United States marshal for the Eastern District of Arkansas, addressed a letter from Little Rock to the Attorney-General, making an inquiry as follows :

"If an officer of the United States whose business requires him to travel in different States is subpœnaed at *this place* [Little Rock] to attend before U. S. court as a witness here at October term, but who is in New Orleans or any other place at time required to start to reach court by first day, and does come from such place; is he entitled to be paid actual expenses from the place from which he travels, or can he only compute while here, the place he was when subpœnaed?"

October 24, 1884, the Acting Attorney-General referred this letter "to the First Comptroller of the Treasury, to inform the marshal" upon the question propounded for an opinion thereon.

OPINION BY WILLIAM LAWRENCE, *First Comptroller*.

Under a long continued and very proper usage the First Comptroller frequently gives opinions to disbursing officers, as to their legal right to pay claims presented to them for payment. So, opinions are often given in advance, by the Comptroller, as to the authority of officers or agents of the United States to make contracts for services or supplies for the Government. These opinions are only given, however, when all the requisite facts are sufficiently stated, and when there is a *bona fide* intention to make contracts if warranted by law. But an opinion will not be given, involving the decision by the Comptroller of a mere hypothetical question or case. This is the rule adopted by the Attorneys-General. Thus, the Attorney-General in an opinion given to the Secretary of the Treasury, January 8, 1872 (13 Op. Att.-Gen., 568), says, that, "According to settled practice, the Attorney-General is not required to answer abstract or hypothetical questions;" and he accordingly defers an answer to inquiries of the Secretary, "until shown that they arise in the administration of the Treasury Department" (2 Op. Att.-Gen., 311. 499, 531; 9 *Id.*, 421; 10 *Id.*, 50, 220; 11 *Id.*, 189; 12 *Id.*, 433; 13 *Id.*, 531;

14 *Id.*, 191, 367; 16 *Id.*, 94). The statutes imposing duties on, and giving powers to the Attorney-General, are sufficiently similar to the statutes regulating the jurisdiction and powers of the First Comptroller to make the opinions above cited applicable in this case. Courts will not take jurisdiction of a merely colorable dispute. There must be a real and substantial controversy between parties in interest in order to invoke the exercise of judicial authority (Lord *v. Veazie*, 8 How., 255; *Kelsey et al. v. Forsyth*, 21 *Id.*, 85; *Cleveland v. Chamberlain*, 1 Black, 425; *Wood-Paper Co. v. Heft*, 8 Wall., 336).

In view of these principles no definite answer can be given to the letter of the marshal. It presents only a hypothetical question. It does not appear that the United States is a party to, or interested in, any suit in which the question propounded has arisen or can arise, or, indeed, that it exists, or is likely to arise in any case. And, if it does exist, the facts are not sufficiently given, on which to express any reliable opinion. The duties of some officers of the United States require them to travel extensively; and their traveling expenses are paid by the Government. Then, the marshal may regard some persons in the service of the Government as *officers*, who are not so.

An officer of the United States, who is away from his place of business as a witness for the Government in a case in court, and who, under the statute, has a right to the payment of his necessary traveling expenses, will be entitled to payment of such expenses as he has incurred in going to, and returning from, the place where he testifies. The starting place, from which traveling expenses are to be computed, is generally that point which, in view of all the circumstances, may be fairly regarded as the official "place of business" of the witness. The place of return is to be determined in the same mode. The place of return is not *necessarily* the starting place; and the general residence of the witness is not always to be regarded as either the starting place, or place of return. If a witness for the Government is in good faith on his reasonable official business away from his residence, at a locality, and starts from there exclusively for the purpose of attending court, that is the starting place. If he then in good faith returns to his resident place of official business, or, for official business purposes, to the place from which he started, such is to be regarded as the place of return. The statute declares that:—

"When any clerk or other officer of the United States is sent away from his *place of business* as a witness for the Government, his necessary expenses, * * *, in going, returning, and attendance on the court, shall be audited and paid." (Rev. Stat., 850.)

The official "place of business" of the witness will generally be regarded as the place of starting and return. The official "place of business" of an *officer*, whose duty it is to travel about in different localities, is wherever official duty requires him to be. When an officer has a fixed place of official business, that is generally to be regarded as the place of starting and return. But official duty *may* call an officer with

a general and fixed place of business elsewhere, and he may be required in that event to proceed directly as a witness to the place where he is to testify; and in such case the point from which to compute expenses will generally be such starting place. In short, an officer who attends court "away from his place of business as a witness for the Government," is to be re-imbursed, or *made whole*, for the expenses necessarily incurred "in going, returning, and attendance on the court." He is not to make a profit out of the transaction.

The marshal will be advised to report the facts more fully, if he desires further information.

TREASURY DEPARTMENT,

First Comptroller's Office, November 10, 1884.

IN THE MATTER OF THE RIGHT OF ACCOUNTING OFFICERS TO WITHHOLD PAYMENT OF COMPENSATION DUE FROM THE GOVERNMENT TO A CLERK OF A COURT OF THE UNITED STATES, FOR THE PURPOSE OF ASCERTAINING HIS LIABILITY TO THE UNITED STATES AS SURETY ON AN OFFICIAL BOND, AND OF SETTING OFF THE LATTER AGAINST THE FORMER.—HUMPHREY'S CASE.

1. The law of set-off, as it exists by judicial common law, in equity, by National Executive common law, and by statute, considered.
2. The rules of law which apply to the Government and to individuals are, with some exceptions growing out of considerations of public policy, generally the same.
3. In 1868 W. executed a joint and several bond to the United States with H. as surety, conditioned for the faithful performance of the duties of the former as clerk of a court of the United States. In 1884 H. was appointed and qualified as the successor of said clerk. There is due from the United States to H. for fees earned in March, 1884, \$254. It appears probable that W. is indebted to the United States for money received by him as clerk, which can only be collected from H. as surety on said bond. H. asks that the compensation due him be paid.

Held:

- (1) The accounting officers have a right to withhold payment for a reasonable time to ascertain if H. is indebted to the United States as surety of W., and if so found, to make a set-off of the indebtedness on the bond against the claim of compensation for fees.
- (2) The authority so to withhold payment and make a set-off exists by usage which has become National Executive common law.
- (3) It exists by force of sections 236, 277, and 269 of the Revised Statutes, and is in principle substantially sustained by the Supreme Court in *McKnight v. United States*, 98 U. S., 180, 186.
- (4) It exists as incidental to the power to carry into effect the act of March 3, 1855 (18 Stat., 481).

In the year 1868 W. W. Wharton, with F. C. Humphreys and others, sureties, executed a joint and *several* bond to the United States in the penalty of \$2,000, conditioned for the faithful performance of the duties of said Wharton as clerk of the United States courts for the northern

district of Florida, at Pensacola. March 7, 1884, the Acting Solicitor of the Treasury notified the First Comptroller that he was advised that Wharton had abandoned the clerk's office, and had "failed to account for moneys paid into the Registry of the Court by the United States marshal in certain cases under the charge of this [the Solicitor's] office." The amount is not yet ascertained, but proper examinations are in progress to determine it. It is reasonably certain that nothing can be made from said Wharton.

March 6, 1884, said Humphreys was appointed and qualified as clerk of said courts to succeed Wharton. There is claimed by said Humphreys to be due to him from the United States for fees earned as clerk at the March Term, 1884, of said court the sum of \$338.85, of which \$254 was allowed by the First Auditor, June 9, 1884, whose report, however, has not yet been adjusted by the First Comptroller. Said Humphreys asks for payment. The question is submitted to the First Comptroller to decide whether said sum shall be paid or withheld to await the determination of Humphrey's liability to the United States on the said bond of Wharton.

Hon. *J. M. McGrew* and *William Small* submitted an argument for Humphreys, claiming "that the act of March 3, 1875 (18 Stat., 481), * * * does not apply to our client's case, as it has not been *ascertained* whether he is indebted to the United States as surety on the bond of Wharton. No suit has been instituted. Wharton denies indebtedness to the United States. The withholding of our client's salary, besides being without authority of law, is contrary to public policy."

OPINION BY WILLIAM LAWRENCE, *First Comptroller*.

If the relations between the United States and Humphreys existed between two private citizens, there can be no doubt as to what would be properly and legally done. If A owed B \$1,000 for the personal services of the latter to the former, and if B, as surety for C, was indebted to A in \$1,000 on a joint and *several* bond for the payment of money *past due*, it is not probable that A, at least while he could have any doubt of the responsibility of C, would make payment to B. In such case, in a suit by B against A, the latter could, under the ordinary statutes of set-off, defeat the action by setting off the amount due from B to A on the bond.

At common law set-off was not allowed as a defence, except so far as it arose out of the *same transaction*. The debt set off had to be *connected in its origin* with the debt upon which the action was brought. (2 Pars. Cont., 6th ed., 733.) A set-off, as a defence, in its proper sense of *cross demand*, was at common law recoverable only by a separate action. (Adams, Equity, [222].) The want of such a defence at law being productive of great mischief and inconvenience, it was introduced by equity (2 Ban. Neg. Inst., § 1422). By the statute of 8 Geo. II, c. 22,

it was enacted that where there "are *mutual debts* between the plaintiff and defendant, one debt may be set off against the other." (Bac. Abr., *Set-off*; 2 Pars. Cont., 239 *et seq.*; Chit. Cont., 840 *et seq.*; Burrill's Law Dict., *Recoupment*; Bart. Pr., 146.) The provisions of this statute have been generally adopted by the various statutes of set-off in this country, though they will be found as a rule, less rigorous in their terms. Courts of equity generally extend the doctrine of set-off beyond the law. (Pars. Cont., 6th ed., 734.) In order to prevent irremediable loss courts of equity sometimes allow a set-off where it could not be admitted at law, as, for instance, in cases where the demand is not yet payable. (Feazle v. Dillard, 5 Leigh, 30; McClellan v. Kinnaird, 6 Grat., 352; 2 Stor. Eq., §§ 1434, 1437.) But the general principle underlies the various statutes, that the debts which can be set off against each other must arise and rest upon the *same right*. (Pars. Cont., 738; Brewer v. Norcross, 2 Green, 219; Glazebrook v. Ragland, 8 Grat., 333.) In a suit brought by an individual there cannot be set off against him a debt due by him *jointly* with another (2 Dan. Neg. Inst., § 1429). This may be said to be the invariable rule resting upon the various English and American statutory enactments which regulate the subject of set-off. But the English and American rules differ concerning the right of set-off of an instrument made by joint and *several* makers against either of them in an action brought by either for a debt due him individually. In England such a set-off is not allowed, because under the statute of 8 Geo. II, c. 22, the debts due between the parties must be strictly "*mutual*," in order that they may be admitted as a set-off. But in some of the States of the United States such a set-off is allowed, either by express statute or by construction. (2 Dan. Neg. Inst., § 1429; Powell v. Hogue, 8 B. Mon., 443; Pate v. Gray, 1 Hemp. C. C., 155; 2 Pars. N. & B., 609. See 2 Dan. Neg. Inst., § 1431, and cases cited, viz: Concord v. Pillsbury, 33 N. H., 310; Mahurin v. Pearson, 8 Id., 539; Kent v. Rogers, 24 Miss., 306; Slayback v. Jones, 9 Ind., 470; Newell v. Salmons, 22 Barb., 647; Lynch v. Bragg, 13 Ala., 773.) "In action on a bond given with surety a claim of the principal debtor may be set off." (Waterman on Set-Off, 259, citing Concord v. Pillsbury, 33 N. H., 310; citing Mahurin v. Pearson, 8 Id., 541; Boardman v. Cushing, Id., 119; Slayback v. Jones, 9 Ind., 470. See Woodruff v. State, 2 Eng., 333. See Waterman on Set-Off, 253, citing Booe v. Watson, 13 Ind., 387; Kenedy v. Cunningham, Cheeves R., 50; Bullard v. Dorsey, 7 S. & M., 9; Powell v. Hogue, 8 B. Mon., 443; Lewis v. Culbertson, 11 Serg. & Rawle, 43; Meade v. Scott, 4 Vt., 26; Meade v. Leslie, 2 Vt., 569; Cowder v. Elliott, 2 Mo., 60). "The amount due on the condition of a bond may generally be pleaded in set-off." (2 Parsons, Cont., 6th ed., 737, [399]; Burgess v. Tucker, 5 Johns., N. Y., 105; Neariffe v. Hogan, 2 Burr, 1024.) The result of the authorities as applied to private persons in a case analogous to this is, that A when sued by B on a debt arising on contract, may set off a similar indebtedness owing jointly and *severally* by B and C to A.

Such are the principles of law applicable as between private persons. The Supreme Court has said that "with few exceptions, growing out of *considerations of public policy*, the rules of law which apply to the government and to individuals are the same." (*McKnight v. United States*, 98 U. S., 186.)

It may, however, be urged that the jurisdiction of law courts in matters of set-off is regulated by statutes which do not apply to accounting officers. To this there are several sufficient answers.

1. The right to *withhold* from the claimant in this case the compensation due him, until his liability as surety on the bond of Wharton is determined, and until the necessity of enforcing such liability is ascertained, is well settled as a part of the system of National Executive common law. Usage has made it law. This has been shown elsewhere. (Pease's case, 4 Lawrence, Compt. Dec., 504.) Parties who deal with the Government do so in view of the usage, which enters into and becomes part of the contract or conditions on which their dealings are based. (1 Greenl. Ev., 294; 2 Wharton Ev., 969, 970.) This right to *withhold payment for a reasonable time*, of course, could not exist, if the *further right* did not exist to make the set-off, when the claims on both sides shall be finally adjusted. If the United States were now sued by Humphreys in the Court of Claims, a reasonable time would undoubtedly be allowed to secure evidence in support of a set-off. And the Supreme Court has decided that under section 1359 of the Revised Statutes a set-off in such case may be made in the Court of Claims. (*McKnight v. United States*, 98 U. S., 186.) This was in a case, too, in which the syllabus says:

"A., in whose favor the allowance was made, being then indebted as surety on an official bond given to the United States, the amount of such indebtedness was properly retained by the Treasury Department as a set-off to await the final adjustment and settlement of the accounts of his principal. Held, that the Court of Claims was bound to adjudge accordingly."

The usage of the accounting officers to make a set-off in such cases has become National Executive common law. Thus, the authority of the proper accounting officers to retain the salary of the claimant in this case is fully sustained. (3 Lawrence, Compt. Dec., Introd., xxii, and note; *United States v. Macdaniel*, 7 Pet., 14.)

2. The authority to retain from the claimant the salary now in question and to make the set-off mentioned, exists by force of sections 236, 272 and 269 of the Revised Statutes. This is sufficiently shown elsewhere. (Taggart's case, 17 Ct. Cl., 327; Pease's case, 4 Lawrence, Compt. Dec., 502.)

The act of March 3, 1875 (18 Stat., 481), provides:

"That when any * * * claim [against the United States] duly allowed by legal authority shall be presented to the Secretary of the Treasury for payment, and the * * * claimant therein shall be indebted to the United States in any manner, whether as principal or surety, it shall

be the duty of the Secretary of the Treasury to withhold payment of an amount of such * * * claim equal to the debt thus due to the United States."

In cases of this class the Secretary acts through the Comptroller, who retains the money by declining to authorize payment in the usual form. Sections 236, 277 and 269 of the Revised Statutes give the authority by which the indebtedness to the United States of Humphreys as surety on the bond of Wharton may be ascertained, and this will be done and the set-off made as soon as practicable.

Payment will be withheld from the claimant until his liability, if any, to the United States is ascertained, when a set-off will be made.

TREASURY DEPARTMENT,

First Comptroller's Office, November 12, 1884.

IN THE MATTER OF THE POWER OF ANY OFFICER OF THE EXECUTIVE GOVERNMENT OF THE UNITED STATES TO CHANGE THE SETTLEMENT OF AN ACCOUNT BY A COMPTROLLER.—CRITTENDEN'S OPINION.

1. The decision of a Comptroller "is final and conclusive upon all branches of the executive government" of the United States.
2. "The settlement and adjustment of accounts have been by law left to" accounting officers.

The following opinion of Attorney-General Crittenden has never heretofore been published. The original is on file in the Treasury Department, and a copy is in the records of the Department of Justice. He gave a somewhat different opinion November 13, 1852 (5 Op. Att.-Gen., 630). This subject has been discussed, and opinions have been collected, elsewhere (1 Lawrence, Compt. Dec., 2d ed., App., Ch. XII, pp. 509-559).

OFFICE OF ATTORNEY-GENERAL,

Sept. 12th, 1850.

SIR: I have examined the case of Robert H. Piatt, on whose part a pecuniary compensation is claimed from the Government for services alleged to have been rendered by him in the war of 1812.

That claim, as it appears, has been regularly submitted, for examination & settlement, to the proper accounting officers of the Treasury Department, & has been decided against & rejected by both Auditor & Comptroller. From that decision an appeal is made to you, & you have referred the case for my opinion.

Before taking any notice of the merits of this claim, I desire most respectfully to suggest for your consideration, whether it is proper for you to interfere at all in the case, or for me to give any opinion on its merits.

My clear conviction is that *the decision of the Comptroller on this claim is final and conclusive upon all the branches of the Executive government—*

that the law allows of no appeal to you, & gives you no power to revise or interfere with that decision for any purpose of controlling, correcting, or altering it. Congress has properly and wisely forbore to impose on the President the impracticable duty of exercising an appellate jurisdiction in the settlement of the almost innumerable claims that are brought against the Government. His supervision & his duties are of a higher & more general character, and *the settlement & adjustment of accounts have been left to accountants.*

These views are all fully sustained by a most able and luminous opinion of the late Att'y-General, Mr. Wirt, addressed to the then President, upon a case almost identical with that now under consideration & involving the same question. I concur in that opinion, & refer to it as eminently worthy of perusal. (Opinions of the Attorneys-General, page 471.) It contains a citation of all the acts of Congress that relate to the subject, & an argument to which nothing can be added.

Such are my impressions against your power of interference in this case, & until you decide otherwise, I shall forbear to express any opinion on the merits of the claim in question, & await your further directions.

I have the honor to be, very respectfully, yr's, &c.,

J. J. CRITTENDEN.

To the PRESIDENT.

IN THE MATTER OF THE RIGHT OF A DISTRICT ATTORNEY OF THE UNITED STATES TO RECEIVE PAYMENT FOR SERVICES RENDERED BY HIS ASSISTANT ATTORNEY.—ZABRISKIE'S CASE.

1. Under section 363 of the Revised Statutes the Attorney-General may retain an attorney to assist a district attorney of the United States, and the amount of his compensation may be fixed after such service has been rendered.
2. The authority of the Attorney-General to fix the amount of compensation to be paid to an assistant to a district attorney cannot be delegated.
3. Payment for the services of such assistant cannot be lawfully made to the district attorney.

May 8, 1883, the Attorney-General addressed a letter to Edmund W. Wells, Prescott, Territory of Arizona, saying:

"You are appointed as assistant to the U. S. Attorney for the Territory of Arizona, James A. Zabriskie, Esq., to discharge the duties of Assistant Attorney in all government business in the U. S. Court, held in the Third Judicial District in the Territory.

Your compensation will be paid out of his fees and emoluments of office."

May 15, 1883, Wells took the oath and entered on the duties of his office. August 10, 1884, James A. Zabriskie, the Attorney of the United States for the Territory of Arizona, rendered an account against the United States for the services of said Wells to the amount of \$540,

duly verified by oath of said Wells, showing said sum to be "justly due to James A. Zabriskie, United States Attorney."

September 10, 1884, this account was approved by the proper court and transmitted to the Acting Attorney-General who indorsed thereon "September 20, 1884, approved for \$540 and * * * referred to the First Auditor," &c. September 22, 1884, the First Auditor reported it to the First Comptroller with an allowance of \$400.

The only provision of law authorizing the appointment of assistants to United States Attorneys is the following in the Revised Statutes:

SEC. 363. The Attorney-General shall, whenever in his opinion the public interest requires it, employ and retain, in the name of the United States, such attorneys and counselors at law as he may think necessary to assist the district attorneys in the discharge of their duties, and shall stipulate with such assistant attorneys and counsel the amount of compensation, and shall have supervision of their conduct and proceedings.

Under this section, three different modes of fixing the amount of compensation of assistants have been adopted by the Attorney-General: (1) to some, salaries are given; (2) to others, fees are allowed in the same manner as to United States Attorneys for like services; (3) to others, as in the case of Mr. Wells, such compensation as may be agreed upon is to be paid by the District Attorneys out of the fees and emoluments of their offices. When (1) salaries, and when (2) fees are allowed, the Attorney-General stipulates with the Assistants the amount of compensation which is paid from the proper appropriation under the general head "For payments [of fees] of district attorneys and their assistants." (22 Stat., 336, 631.) The question is now presented, whether payment of the same, due to the assistant, Wells, can be made to the attorney, the claimant in this case.

DECISION BY WILLIAM LAWRENCE, *First Comptroller.*

It does not appear that the Attorney-General fixed any *amount* of compensation to be paid for the services of Mr. Wells as assistant to the United States Attorney for Arizona, except that his approval is indorsed on the claim which has been made by the attorney. The assistant was lawfully appointed, and, under a usage so long continued as in principle to settle the construction of section 363 of the Revised Statutes, the compensation may be fixed by the Attorney-General *after* the services have been rendered. District Attorneys' Assistants' case, 4 Lawrence, Compt. Dec. 114; 16 Op. Att.-Gen., 101.

The letter, though its terms do not so require, of the Attorney-General, appointing Mr. Wells as assistant, &c., has perhaps been construed as giving to District Attorney Zabriskie authority to fix the amount of compensation to be paid to said assistant. The Attorney-General may, in his own judgment and discretion, exercise such authority, but it cannot be transferred to, or devolved upon, a district attorney.

This is one of the cases in which the maxim in the law of agency is applicable to the exercise of official authority, that, "a delegated authority cannot be redelegated." *Delegata potestas non potest delegari*, or, as it is otherwise expressed, *vicarius non habet vicarium*. Agency Delegation case, 3 Lawrence, Compt. Dec. 66; Substitute case, *Id.*, 347.

A fatal objection to the payment of this claim is that it is not made by Mr. Wells, the assistant, who *performed the services*, but is presented by, and approved in favor of, Mr. Zabriskie, the District Attorney. The statute under which the assistant was appointed provides that the Attorney-General "shall stipulate with such assistant * * * the amount of compensation." (Rev. Stat. 363.) And another statute declares that "no compensation shall hereafter be allowed to any person, besides the respective district attorneys, and assistant district attorneys * * * except," &c. (Rev. Stat. 365.) These provisions evidently recognize the exclusive right of an assistant to receive directly the compensation fixed for his services; but without any such statutory recognition, the necessary effect of authorized employment and services thereunder, upon general principles of law and justice, is to require payment to be made only to the assistant. This right of the assistant to compensation cannot, by any contract or arrangement, be assigned to the District Attorney. (Rev. Stat. 3477.) When salaries are paid to the assistants, for their services, the District Attorneys are allowed for those services, and are not required to include in their emolument returns as emoluments of their respective offices the salaries so paid. Therefore, so far as respects the expense to the Government, there is a saving, when, instead of salaries payable from the Treasury, the assistants are paid by the District Attorneys out of the fees allowed to the latter.

If the account were stated in the name of Mr. Wells and it should be shown that he actually rendered the services, and, if, in other respects, the claim is valid, there would probably be no objection to payment, unless the right to it has been lost by some arrangement which does not appear.

The claim of Mr. Zabriskie is disallowed.

TREASURY DEPARTMENT,

First Comptroller's Office, November 13, 1884.

IN THE MATTER OF THE RIGHT OF AN OFFICER OF THE ARMY OF THE UNITED STATES TO BE REIMBURSED FOR EXPENSES NECESSARILY INCURRED IN DEFENDING HIMSELF IN A SUIT BROUGHT AGAINST HIM IN A STATE COURT FOR THE LAWFUL PERFORMANCE OF AN OFFICIAL DUTY.—ARMY OFFICER'S CASE.

1. February 1, 1884, a deputy sheriff of Tom Green County, Texas, demanded of Lieutenant A., then post adjutant of the 16th United States Infantry, at Fort Concho, Texas, the surrender, without warrant of arrest, of a private soldier of said regiment, alleged to be guilty of burglary. The post adjutant declined to make the surrender except upon the order of the commanding officer. The accused was, in the mean time, confined in the post guard-house, and the next day delivered to the same deputy sheriff who had then a warrant of arrest. February 3, 1884, the post adjutant was arrested, and, on trial before a county justice of the peace for resisting the deputy sheriff, was acquitted. April 9, 1884, he was again arrested under an indictment, found in the district court of said county, charging him with the same felony, but the court quashed the indictment. He now applies to the Government for reimbursement of the \$50, necessary counsel fees, which he paid for his defence.

Held:

- (1) A sheriff has no legal right, without a warrant of arrest, on a mere verbal charge of crime, to take a soldier of the United States from the control of his commanding officer.
- (2) "The interests of the United States" being involved in the arrest and trial of the post adjutant, it was the duty of the Government to assume the burden of his defence.
- (3) When an officer or employee of the United States, who is sued for the performance of a legal duty, fails to give the required notice thereof to the Attorney-General, he cannot be reimbursed for the expenses of a defence.
- (4) But notice to the Attorney-General is only required when it is reasonably possible to give it. When it is impracticable, as it was in this case, to give such notice, the officer sued, who carries on his own defence at his own expense, is entitled to be reimbursed by the Government.
- (5) The Sundry Civil Appropriation act of March 3, 1883 (22 Stat. 603, 630), by appropriating money for defraying "expenses of suits in which the United States is interested," makes an appropriation from which the claimant is entitled to be reimbursed the \$50 paid by him for counsel fees.
2. The opinion of Attorney-General Black, of June 14, 1857 (9 Op. Att.-Gen., 53), concurred in on one point: as to another principle therein stated,—*quare?*
3. The Agent-Reimbursement case (5 Lawrence, Compt. Dec., 293), re-affirmed.
4. General terms in a statute should, when the language and purpose thereof will reasonably permit, be so construed as to admit of exceptions, when, otherwise, palpably unjust and absurd consequences would result.

July 28, 1884, Leven C. Allen, first lieutenant and adjutant of the 16th United States Infantry, stationed at Fort Concho, Texas, made a report addressed to the Adjutant-General of the Army at Washington city as follows:

On the first of February, 1884, a deputy sheriff of Tom Green County, Texas, came to this post to arrest Private John Regan, band 16th In-

fantry, for an alleged burglary in the town of San Angelo, Texas. He applied to me as post adjutant for the man, but as he had not a warrant for the arrest I declined to deliver the man into his custody, and interposed so far as to induce the deputy sheriff to desist in his attempt until I could get the orders of the commanding officer. When I reported the facts to the commanding officer he ordered Private Regan to be confined in the post guard house, and the deputy sheriff was notified that the man would be held in safety until such time as a proper warrant for the arrest could be presented.

All of this was accomplished, and Private Regan was delivered to the same deputy sheriff on a proper warrant the following morning.

For my part in the matter I was arrested the following day and tried before a justice of the peace [of said county] but acquitted. I was again arrested and taken from my duties on the 9th of April, 1884, on a grand jury indictment [in the district court in said county] for the same act. Being entirely ignorant of the methods of procedure before civil courts, and *in order to avoid being confined in the county jail* for an indefinite period, it was necessary for me to employ counsel *at once*, to obtain my release under bond, and to conduct my defence. As this indictment and arrest were undoubtedly not for the supposed ends of justice, but for the avowed purpose of giving annoyance, the only means of meeting the attack was to bring the case to *immediate trial* on a motion to quash, which was done with a result favorable to me. * * *

Believing that I was in no way to blame, but that I was acting within the requirements of duty in the first instance, and believing further that my action in employing counsel on my own responsibility to secure my return to duty and to carry the case to a prompt conclusion was to the best interests of the service, I respectfully submit that in justice to to me the attorney's fee * * * should be refunded to me by the United States, in whose interests it was incurred.

The indictment charges that Allen did "unlawfully, feloniously, and wilfully oppose and resist" the deputy sheriff, "in attempting to arrest * * * John Regan being then and there charged with a felony, to wit, the felony of burglary," &c. The evidence sufficiently shows that Allen acted in good faith; that it was impracticable for him to give notice to, or secure the aid of any officer of the Department of Justice in his defence, that he paid an attorney the reasonable fee of \$50 for necessary services in his defence, and that the indictment was quashed.

May 28, 1884, M. M. Blunt, colonel 16th Infantry, commanding, forwarded said report of Lieutenant Allen to the Adjutant-General, with an indorsement saying:

"I would urge that Lieutenant Allen be reimbursed this money, \$50. His course was in my opinion entirely proper, and was sustained by me. I could not allow the arrest of a soldier by civil authority without proper warrant."

August 4, 1884, J. W. Clous, captain 24th Infantry, judge-advocate, made an indorsement saying that—

"It appears that Lieutenant Allen was indicted for an act flowing from the lawful discharge of a public duty * * *. The *immediate employment* of counsel for his defense became a necessity."

The papers are indorsed by the Acting Attorney-General, as follows:

"September 17 [1884], approved for \$50 [payable from appropriations for], miscellaneous expenses [of United States courts], 1884, and respectfully referred to the First Auditor of the Treasury."

October 31, 1884, the First Auditor's report to the First Comptroller finds—

"That there is nothing due him [Allen] as payable from the appropriation of miscellaneous expenses of the United States courts, 1884. The case against Lieutenant Allen was instituted in and finally disposed of in the State court, and was not connected with the United States courts."

The question is presented to the First Comptroller to decide whether the claim shall be paid, and, if so, from what appropriation.

DECISION BY WILLIAM LAWRENCE, *First Comptroller.*

Lieutenant Allen was charged with a felony, tried before a justice of the peace and acquitted; he was then charged with the same felony by indictment, which was quashed.

It is sufficiently shown that Lieutenant Allen was unlawfully prosecuted for an act lawfully done in the proper performance of his duty. (Wirt, Attorney-General, October 5, 1825, 2 Op. Att.-Gen., 11; Winthrop's Digest of the Opinions of the Judge Advocate General (1883), 27, 29; Fifty-ninth Article of War, Rev. Stat., page 235; United States Army Regulations of 1881, Article LVIII, secs. 844-848; *Dow v. Johnson*, 100 U. S. 169; *Ex parte McRoberts*, 16 Iowa, 603-605; *Ex parte Bright*, 1 Utah, 151; *Kilbourn v. Thompson*, MacArthur & Mackey's, Sup. Court, D. C., Rep., 406.)

When a felony has been committed, a sheriff or marshal may generally arrest the guilty party, even without a warrant. Bouvier Dic. Title, Arrest. But the right so to arrest, on a mere verbal charge of crime, does not exist, when the accused is in the lawful custody, or under the lawful control, of a public officer. The statute (Rev. Stat., 1342) provides that "the armies of the United States shall be governed by" specified rules and articles, one of which latter (Art. 59, Rev. Stat., page 235) provides that—

"When any * * * soldier is accused of * * * any offense * * * punishable by the laws of the land, the * * * officers of the regiment * * * to which the person so accused belongs are required * * * upon application *duly made* * * * to use their utmost endeavors to deliver him over to the civil magistrate."

This is merely declaratory of the common law rule on the subject, and its effect is to authorize an arrest of a private soldier only by virtue of a proper warrant of arrest. The expression "upon application *duly made*" clearly requires this. The word "*duly*" here means *legally*, that is, with a warrant, as legal evidence of authority. (Lawson's Concordance, Title, "*Duly*.") The military officer who is asked to surrender a

soldier without a warrant cannot know whether such soldier is, as said article 59 requires, charged with an offense "punishable by the laws of the land." It would be a most unreasonable and unsafe rule which would permit a sheriff or marshal, on his own unsupported statement, and on his own judgement that an offense had been committed, to demand and obtain the surrender of a soldier. A rule requiring such a surrender, which the law does not admit, would impair the efficiency of the military service.

It is evident that the United States was interested in the defense of Lieutenant Allen. "The interests of the United States" (Rev. Stat., 367) were involved in his arrest and in his trial; and, more than this, upon the facts of this case, it was the *duty* of the United States to assume the burden of the defense. This duty is implied in the provision made by statute for such case. The statute provides that—

"The Solicitor-General, or any officer of the Department of Justice, may be sent by the Attorney-General to any State or District in the United States to attend to the interests of the United States in any suit pending in any of the courts of the United States, or in the courts of any State, or to attend to any other interest of the United States."

If the Attorney-General could have been notified in due season to send some officer of the Department of Justice to defend Lieutenant Allen, and thereby "to attend to the interests of the United States," he might have done so. In such case, also, the Attorney-General, under section three, of the act of June 20, 1874 (18 Stat., 101, 109), might have employed, and authorized payment of, a district attorney to make such defense. (Bliss's Case, 4 Lawrence, Compt. Dec., 38.) The duty of the Government to make defense in such case has often been recognized. Thus Attorney-General Black (9 Op. Att.-Gen., 52) has said that—

"When an officer of the United States is sued for doing what he was required by law, or by the special [lawful] orders of the Government, he ought to be defended by the Government. * * * It has been the uniform practice of the Federal Government ever since its foundation to take upon itself the defense of its officers who are sued or prosecuted for executing its laws." (Agent-Reimbursement case, 5 Lawrence, Compt. Dec., 293.)

The Army Regulations duly authorized, and generally having the force of law, recognize the obligation of the Government to make defense in such cases as this.*

* The Army Regulations of 1881, page 82, contain the following:

844. The subject of employment of counsel at the expense of the United States is solely in charge of the Department of Justice. G. O. 63, 1873.

845. When a necessity arises for an attorney or counselor to defend or advise officers and others connected with the military service, in cases connected with their public duties, request, with report of the facts, will be made to the Adjutant-General through the regular military channels, except in cases which will not admit of delay, when the request may be sent direct. G. O. 63, 1873; G. O. 15, 1874.

846. The Adjutant-General shall promptly submit all such requests to the Secretary of War for reference to the Department of Justice. G. O. 63, 1873.

847. Officers and others in the military service employing an attorney or counselor

It is generally required of officers, who desire a defense to be made by the Department of Justice, or at the expense of the United States, *to give notice thereof*, when practicable, to the Attorney-General, in order that he may employ the agencies authorized by statute for that purpose. An officer who fails to give such notice when it is reasonably practicable to do so, and who, in such case, "carries on his own defense," and at his own expense, has no legal claim to be reimbursed by the Government therefor. This has been decided, in principle, in *Dunnegan's case*, (2 Lawrence, Compt. Dec., 92; s. c., 17 Ct. Cl., 247; *Wade's Law of Notice*, 417).

It has been said that—

"If an officer sued for doing his duty carries on his own defense, without appealing to the Government for aid during the pendency of the cause, I think he has a just claim, after it is determined, to be placed in as good a condition as he would have been in if the Government had taken the defense on itself; in other words, to be paid the sum he is out of pocket." (Attorney-General Black, June 14, 1857, 9 Op. Att.-Gen., 53.)

This was prior to the act of June 22, 1870 (16 Stat. 162, sec. 5), now section 367 of the Revised Statutes, making specific provision for defense in such case as this, and is not generally applicable now, and is not supported by legal principle or sound policy. It is clear, then, that the United States was under a legal obligation to make the defense of Lieutenant Allen, if the proper request had been made by him of the Attorney-General; and there being such obligation, it is also clear that, had such request been made, and the Department of Justice had failed to make the defense, Lieutenant Allen would have a legal claim on the United States to be reimbursed for such reasonable expenses as he might have thereby incurred. This principle is affirmed in *Trustees of Cincinnati Township v. Ogden* (5 Ohio, 27). In that case it appeared that the statute of Ohio required the trustees of each township, on "complaint being made" to them "that any inhabitant or inhabitants are in a suffering condition," to provide relief. An individual having, without the request of the trustees, furnished relief to an inhabitant of a township who was in a suffering condition, brought an action against the

without being specially authorized to do so will be required to pay the expenses attendant upon such employment. G. O. 15, 1874.

The United States does not assume the defense of its officers for unauthorized and illegal acts. (Agent-Reimbursement case, 5 Lawrence, Compt. Dec., 289.) Nor is the Government liable for any judgment rendered against an officer for such acts. Thus, in *Kilbourn v. Thompson*, it is said, that "the defendant has no recourse against the United States for indemnification or reimbursement, if he shall be compelled to pay damages for the alleged grievance"—an illegal arrest. (*MacArthur & Mackey's Rep. Sup. Ct. Dist. Col.*, 407; *Kilbourn v. Thompson*, 103 U. S., 168.) These cases, in principle, affirm what is said in Agent-Reimbursement case, (5 Lawrence, Compt. Dec., 293).

The United States is not liable to pay the fees of counsel assigned by a United States Court to defend a person charged with crime. (*Nabb v. United States*, 1 Ct. Cl., 173.)

township to recover compensation therefor. The question arising as to his right to recover, the court said :—

“The solution of this question must depend upon the nature of the obligation which rests upon a township to support its poor. * * * If it be an absolute legal obligation, then the law implies a promise, and an action can be sustained. The supreme power of the State, by legislative enactment, has imposed the obligation. * * * We do not say that in every case, where an individual furnishes necessities to a pauper, he can maintain an action against the township. Complaint must in the first instance be made to the overseers of the poor [trustees of the township]. If these neglect their duty, or if the trustees of the township refuse to make the necessary order, it is right and proper for an individual to furnish a distressed pauper with the necessary relief; and justice, sound policy and law require that the individual performing this benevolent act should be remunerated. * * * The township cannot excuse itself by saying that its agents have been guilty of official misconduct.”

See Printer's case, 2 Lawrence, Compt. Dec., 504; *Beach v. Trustees of Marion Township*, 2 Western [Cleveland] Law Monthly, 95.

This is the ordinary case of a liability for the failure to perform a contract or legal duty. On the principle thus stated, a notice to the Attorney-General by a public officer, or employee or soldier requiring a defense, and a failure of the Department of Justice to make the desired defense, are generally requisite to fix a liability upon the United States. The claim in this case cannot be paid, unless (1) it is a case in which no notice is required, or (2) there is a legal excuse for the failure to give it. It is apparent from the legislation above cited, that Congress intended to provide the means of defense for its officers and employees. The spirit and purpose of the legislation extend its equity to cover every case in which an officer or employee is sued because of the legal performance of a public duty.

Every statute is to receive a reasonable and sensible construction. Thus Field, J., in *United States v. Kirby*, 7 Wall., said :—

“All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter.”

In view of this, it seems reasonable to hold that notice to the Attorney-General is only required when it is reasonably possible to give it. When, as in this case, it was impracticable to give it, at least so as to make it available, the law does not require it.

Again, it said that—

“Enactments which impose duties on conditions are, when these are not conditions precedent to the exercise of a jurisdiction, subject to the maxim that *lex non cogit ad impossibilia aut inutilia*. They are understood as dispensing with the performance of what is prescribed when performance is impossible. Maxwell on Statutes, 2d ed., 470, citing cases in illustration of the principle stated.”

So it is said—

“It is a maxim of our legal authors, as well as a dictate of common sense, that the law itself will not attempt to do an act which would be vain, *lex nil frustra facit*, nor to enforce one which would be frivolous—*lex neminem cogit ad vana seu inutilia*—the law will not, in the language of the old reports, enforce any one to do a thing which will be vain and fruitless.” (Broom, Legal Maxims, 252.)

See 2 Parsons, Cont. (6th ed.), 672 and note. It follows that the claimant was not required by law to give notice to the Attorney-General.

The attorney who rendered services for the claimant might have preferred a claim against the United States, if he had not consented to employment on the credit of Lieutenant Allen, and thereby estopped himself against setting up such claim. The claimant has lawfully made himself a creditor of the United States, and is entitled to payment.

The question now arises, is there an appropriation available for the payment of the claim. The sundry civil appropriation act of March 3, 1883 (22 Stat., 603, 630), makes appropriations as follow :

JUDICIAL.

UNITED STATES COURTS.

For expenses of the United States courts: For defraying the expenses of the Supreme Court; the circuit and district courts of the United States, including the District of Columbia; of the jurors and witnesses, *and expenses of suits in which the United States is interested*; of the prosecution for offenses committed against the United States: * * *.

For fees and expenses of bailiffs, furniture, for payment of expenses of district judges who may be sent out of their districts, in pursuance of law, to hold a circuit or district court; *and other miscellaneous expenses*, three hundred and ten thousand dollars.

It will be observed that many specific objects are provided for, including “expenses of *suits in which the United States is interested* * * * and other miscellaneous expenses.” The expense incurred by the claimant arose in “suits in which the United States is interested.” The phraseology above quoted seems to have been inserted in view of the words found in section 367 of the Revised Statutes, making it generally the duty of the Department of Justice “to attend to the interests of the United States in any suit pending in any of the courts of the United States *or in the courts of any State*.” Certainly the words quoted from the appropriation act are sufficiently general and comprehensive to include the claim now in question. It seems to have been supposed that the appropriation mentioned can only be used in cases “connected with the United States courts.” But they cannot be so limited or qualified by a *general caption*. (Artificial-Limbs case, 2 Lawrence, Compt. Dec., 2d ed., 392, 397.) On the contrary, the *specific* and *special* appro-

priation for "expenses of suits in which the United States is interested," is so comprehensive in terms as to include all suits in all courts, and cannot be limited or qualified by a general caption, which can scarcely be said to be a part of the statute. (Huidekoper's case, second, 3 Lawrence, Compt. Dec., 160, 161.)

The claim is allowed, payable from said appropriation.*

TREASURY DEPARTMENT,

First Comptroller's Office, November 15, 1884.

IN THE MATTER OF THE AUTHORITY OF THE DIRECTOR OF THE MINT TO PURCHASE FROM THE COMPUTER OF BULLION IN THE BUREAU OF THE MINT A MANUSCRIPT LIST OF THE MINES OF THE UNITED STATES PRODUCING GOLD AND SILVER, AND TO APPROVE A CLAIM FOR PAYMENT THEREFOR FROM THE APPROPRIATION MADE BY ACT OF JULY 7, 1884 (23 STAT., 175).—LEECH'S CASE.

1. At common law an author has generally an absolute property in his work before its publication.
2. Section 1765 of the Revised Statutes does not prohibit a salaried officer from selling his property in a manuscript work to the United States.
3. To enable the author of a manuscript article to sell it to the United States, there must be (1) some officer or agent *authorized to purchase it*, and (2) payment can in case of such purchase, be made *only when there is an appropriation available for the purpose*.
4. The legislative, executive, and judicial appropriation act of July 7, 1884 (23 Stat. 175) appropriates money to be expended under the direction of the Director of the Mint, "for the *collection of statistics* relative to the annual production of the precious metals in the United States." This gives the Director authority to employ any competent person to render the *service* or *perform the duty* of collecting statistics. But it does not give authority to *purchase* the right of property in a manuscript collection of statistics.

August 4, 1884, the First Auditor adjusted and allowed an account of E. O. Leech against the United States for \$200, and made report thereof to the First Comptroller. The account is as follows:

WASHINGTON, D. C., August 4, 1884.

The United States to E. O. Leech, Dr.

For an article [in manuscript] entitled a "List of the Mines of the United States producing gold and silver, alphabetically arranged by States and Territories, with the name of the mining district and county in which each is located,"—the sum of two hundred dollars.

Received payment

E. O. LEECH.

Approved

R. E. PRESTON,

Acting Director [of the Mint].

* As to the legal obligation of the Government, to defend a soldier indicted in a State Court, for the performance of a military duty, see Thompson's case, 2 Lawrence, Compt. Dec., 249.

Said Leech is, and at the time he wrote the article in question was, an officer, a "computer of bullion" with an annual salary of \$2,200 in the Bureau of the Mint in the Treasury Department. See Act June 19, 1878 (20 Stat., 190), Act July 7, 1884 (23 Stat., 175); Rev. Stat., 343-345. The article is designed to be published in the annual report of Hon. H. C. Burchard, Director of the Mint.

The question is presented to the First Comptroller to decide whether Leech, being a salaried officer, can be lawfully paid the claim mentioned.

E. O. Leech submitted an argument as follows:—

"The manuscript which I sold to the Government consisted of something over one hundred foolscap pages. The manuscript was a work complete in itself, prepared by me at leisure moments, with considerable labor and at some expense, and no portion of the work was performed during official hours.

"This claim is not covered by section 1765 of the Revised Statutes as it is not in the nature of *additional pay*, or *extra compensation*. This section has reference to *services only*. It could not be held that this section would bar the Government from purchasing from a salaried officer, a piece of *property*, a *machine which he had invented* and it would seem that a book or an article which was considered useful, would come in the same category.

"The article referred to was absolutely my own *property*. It was not a *service* required of me, or in the line of my official duties. I was under no obligation to sell it to the Government, and could have sold it just as well to the "Mining Record," the "Mining and Engineering Journal," or any other person. The Director of the Mint purchased it, as he has other articles on mining subjects, for publication in his Annual Report on the Production of the Precious Metals of the United States for the calendar year 1883.

"I do not seek pay for *services* or for the performance of any *duty* whatsoever, but claim the amount due me for a valuable article.

"There have been many precedents in the Department for the payment of such claims, notably the purchase by various bureaus of the Government of a publication compiled by Geo. N. Lamphere, Esq., while Chief of the Appointment Division of the Treasury, entitled "The United States Government," and I invite attention to three cases exactly similar to my own:—

"The first is a bill of "Sharretts & Andrews," voucher No. 42 in the account of Samuel M. McKean, Disbursing Officer of the Treasury Department; Account No. 161,506, for \$500.00 for preparing calculation tables, both being salaried officers of the Department. The voucher referred to shows that it was carefully examined by the Hon. R. W. Tayler, Comptroller. The bill was paid from the appropriation for "Books, binding, &c." of this Department.

"The next is account No. 11,427, in favor of T. M. Eastman, also, at the time, Stenographer to the Assistant Secretary of the Treasury, for preparing an index of the Revised Statutes.

"The third case is account No. 234,780, of O. J. Hollister, for the preparation of an article on the "Output of Gold and Silver in Utah," Mr. Hollister at the time being Collector of Internal Revenue. This article was purchased for publication in the Director's Report, exactly as the one for which I make claim.

"The manuscript of the article for which I seek pay, has been accepted by the Government, and it is not in my power to make any other disposition of it."

DECISION BY WILLIAM LAWRENCE, *First Comptroller*.

At common law an author has, generally, an absolute property in his work before its publication. (1 Shouler, Pers. Property, 89, 671; Wheeler v. Peters, 8 Pet., 591; Ker, Injunctions, 13, 20; Jeffreys v. Brosey, H. Lord's Cas., 815, 919; Prince Albert v. Strange, 1 Mac & G., 25; High, Injunctions, 641-671; 2 Kent, 380 [504]; Eden on Injunctions [275]; Duke v. Shebheare, 2 Eden, 329; Southey v. Sherwood, 2 Meriv., 435; Macklin v. Richardson, Am., 694; White v. Geroch, 2 B & Ald., 298; 2 Blackst., Com., 406; Gray v. Russell, 1 Story, C. C., 11; Emerson v. Davies, 2 Story, C. C., 768; Bartlett v. Critenden, 5 McLean, C. C., 32; Turner v. Robinson, 10 Jr. Ch., 121, 510; Parton v. Prang, 7 Am. Law Rev., 357.)*

Copyrights are secured by acts of Congress for the protection of printed works. Copyrights and the common-law right of an author in his manuscripts are a "species of incorporeal chattels." (1 Shouler, 89.) The claimant in this case, then, was invested with a *right of property* in the manuscript article for which he now asks compensation.

Section 1765 of the Revised Statutes provides that:—

"No officer in any branch of the public service, or any other person whose salary, pay, or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation."

Under this section a salaried officer cannot lawfully receive any compensation beyond his salary "for any other *service* or *duty* whatever, unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such" additional compensation, or, (as it has been held) unless the service is authorized by law, and the *amount* of compensation thereof is fixed by law. And this is the law, whether such compensation is for extra services performed in the line of official duty, or having no connection therewith. (Extra-Pay case, *ante*, 248.) It will be observed the statute only applies to additional compensation for "any other *service* or *duty*." It does not apply to sales of property by an officer. A salaried officer is not prohibited by section 1765 of the Revised Statutes from selling his property in his manuscript to the United States. The claimant, though a salaried officer, can, therefore, sell to the United States the manuscript article in question, if any offi-

* This right of property has been extended so that the law affords protection to it as it exists in the author of private letters. The person to whom letters are addressed has but a limited right or special property in them "as a trustee or bailee for particular purposes, either of information, or of protection, or of support of his rights and character," or as it is conceived for the advancement of public justice, or public interests. (Woolsey v. Judd, 4 Duer, 379; 11 How., N. Y., 49, overruling Wetmore v. Scovill, 3 Edw., 515; and Hoyt v. Mackenzie, 3 Barb., ch. 320; Kiernan v. Manhattan Quotation Telegraph Co., 50 How., N. Y., 194; 2 Kent, Com., 12th ed., 381 [505], n.; 2 Story, Eq. Jurisp., 944-949; Dennis v. Leclerc, 1 Martin, La., 297.

cer thereof *is authorized to purchase it*; and he can in such case be paid therefor, if there is an appropriation available for that purpose.

The next question which arises in this case is, whether the Director of the Mint was *authorized to purchase* the manuscript article in question. He is required by law to make "an annual report to the Secretary of the Treasury" of the operations of "all mints and assay offices" in the United States, and from time to time make "such additional reports setting forth the operations and condition of such institutions as the Secretary of the Treasury shall require." (Rev. Stat., 345.) The legislative, executive, and judicial appropriation act of July 7, 1884, for the fiscal year 1885 (23. Stat., 159, 175), appropriates "for the collection of statistics relative to the annual production of the precious metals in the United States four thousand dollars." It is not by any law made absolutely the duty of any clerk or officer of the Bureau of the Mint to prepare the statistics mentioned. On the contrary, the appropriation mentioned provides *other means* which *may* be employed for *collecting* "statistics relative to the annual production of the precious metals in the United States." The Director of the Mint, "under the general direction of the Secretary of the Treasury," has "the general supervision of all mints and assay offices" under the control of the Bureau. This power of control, with the added duty to make the reports mentioned, and with an appropriation available "for the collection of statistics" as stated, gives ample authority to the Director of the Mint to *collect* the statistics in his discretion in *any mode* not otherwise prohibited or limited by law. His power on this subject is solely to be exercised "for the collection of statistics." The power to do this necessarily results from the familiar principle of the law of agency and of official authority that "whenever a power is given, * * * everything necessary to the making of it effectual is given by implication." (Potter's Dwaris, Stat., 123; 2 Inst., 48, 306; 12 Rep., 130; State v. Moeller, 48 Missouri, 335.) A "list of the mines of the United States producing gold and silver" may fairly be considered a part of the "statistics relative to the annual production of the precious metals in the United States."

It is true that the Director of the Mint is required to show in his annual report the "operations" of "all mints and assay offices" in the United States. This will necessarily name all the mints and assay offices. And it may be, that, so far as *this information* is concerned, it is to be obtained without the aid of the appropriation mentioned. But this information does not include a "List of the Mines." It necessarily follows that the Director of the Mint had authority to *employ* any proper *agency* for the "*collection of statistics*" including a list of the mines as stated. Under this appropriation it is evident that the Director of the Mint could employ a party to *render personal services* in ascertaining the names and locations of mines, and in making a *list thereof*, either from *observation*, from official records of locations made in pursuance of law (Rev.

Stat., 910, 2238, 2318, 2352), or by *compilation* from authentic books or other sources of information. Either of these modes would be within the terms of the appropriation act—"the collection of statistics."

It is not alleged that the claimant was employed to render personal *services* in either of the modes mentioned or in any mode. His contention is (1) that the manuscript for which he claims compensation is *property*, and (2) that the appropriation mentioned is available to make payment therefor. It is certainly true that his manuscript is property.

It is to be specially observed that the appropriation is not in terms for the *purchase of books*, nor in terms for the purchase of *manuscripts as literary property*. The Director of the Mint had no authority to buy manuscript property unless it is conferred by the appropriation act mentioned. No statute gives such power, at least in view of the fact that special provision is made by the appropriation act "for the collection of statistics." (Huidekoper's case, second, 3 Lawrence Compt. Dec., 160.) The real question, therefore, now to be decided is, does the appropriation act of July 7, 1884 (23 Stat., 175), by authorizing the "*collection of statistics*," authorize the *purchase of the manuscript* in question? Is the duty to *collect statistics* exercised by purchasing the manuscript? Is the *power to collect statistics* exercised in the purchase of the manuscript? The solution of these questions depends on the meaning of the phrase in the act of July 7, 1884 (23 Stat., 175), "for the collection of statistics." The word "collection," as a noun, has, among others, two definitions given by Webster, as follow:

- "1. The *act of collecting* or gathering;
- "2. That which is gathered or drawn together."

It must be apparent that the word "*collection*," in the phrase mentioned, is used in the sense of the first of Webster's definitions—that is, the *act, work or service* of collecting. In this view the statute appropriates money to pay for the *service* of collecting or *gathering* of statistics and not for the purchase of a collection of statistics. The appropriation might have been, but was not, "for the purchase of a collection of statistics," or "for procuring a collection of statistics," or "for a collection of statistics." These forms of expression might perhaps have made the appropriation available for the purchase of manuscript property containing the required collection.* The connection in which this appropriation is found leads to the same conclusion. It is this:—

"For contingent expenses of the Bureau of the Mint, to be expended under the direction of the Director, namely: For assay laboratory, chemicals, fuel, materials, and other necessities, one thousand dollars; for examination of mints, expenses in visiting the mints and assay offices for the purpose of superintending the annual settlements and for special examinations, two thousand five hundred dollars; for books, pamphlets, periodicals, specimens of coins and ores, balances, weights,

* See "Collect" in a statute, construed. *Fling v. Goodell*, 40 N. H., 219; *State v. Moeller*, 43 Missouri, 31; in a will—*Going v. Emory*, 16 Pickering, 107 S. C., 26 American Dec., 645.

and incidentals, one thousand dollars; and for the collection of statistics relative to the annual production of the precious metals in the United States, four thousand dollars; in all, eight thousand five hundred dollars."

When, under this act, *property* is to be *purchased*, the authority to buy is clearly indicated by an appropriation of money, *e. g.*, "for assay, laboratory, chemicals, fuel, materials, * * * for books, pamphlets, periodicals." These clauses specifically point out *property* as an *object* to be secured. Traveling expenses are clearly provided for by the clause "expenses in visiting the mints." But when the statute makes its provision as to statistics it is *not* "for a collection of statistics," but "for the *collection* of statistics,"—*for a service* and for which *service*, as the statute says, money is "to be expended under the direction of the Director." There is a manifest difference between the purchase of literary property in a manuscript and the services rendered in collecting statistics. And there may be a reason why Congress would not authorize the purchase, but would authorize the service. A purchase would give the Government the sole authority to use the manuscript, and to enjoin its use for publication by private enterprise. There is no necessity for such absolute dominion, and public policy does not require such restraint of private enterprise. If the Director of the Mint should employ a competent person to render the service of collecting the requisite statistics to be used by the Government *only* for publication in the annual report of the Director of the Mint, the compiler would retain his literary property in his work, and could duplicate his manuscript and sell the right to use it prior to a publication by the Government, or secure a copyright thereon subject to the rights of the United States. These rights would seem to exist at least. But whether so or not, for some sufficient reasons Congress chose to give to the Director only the authority to cause statistics to be collected. The result is that the act of July 7, 1884 (23 Stat. 175), clearly contemplates, and so requires the employment of one or more competent persons to *render the service* of collecting the requisite statistics, and authorizes payment for *that service*. It seems to require service after the date of the statute, and if so, it does not contemplate payment for *completed service* previously rendered. It does not contemplate a purchase of completed manuscript as property. The manuscript *now* in question is believed to be very valuable. But it is much better that Congress should be asked to provide compensation for the services its author has rendered in preparing it, or for his property therein, than for accounting officers to force a construction of an appropriation act in a form to evade section 1765 of the Revised Statutes.

The claim is disallowed.

TREASURY DEPARTMENT,

First Comptroller's Office, November 27, 1884.

IN THE COURT OF CLAIMS.

[From 19th Court of Claims Report 629.]

GEORGE TURNER v. THE UNITED STATES.

[No. 12774. Decided June 2, 1884.]

On the Facts.

- A marshal's account for fees, &c., is approved by a district court, but disallowed by the accounting officers. One of the questions presented is whether a marshal can charge mileage in each case where he serves more than one subpoena for the same party upon different persons at the same time and place. Another is whether a marshal is entitled to a fee of \$2 where a prisoner is remanded.
- I. An approval by a district court of a marshal's account under the *Act 22d February 1875* (1 Supplmt. R. S., p. 145, § 1), is not a judgment. The statute having made such accounts subject to a revision by the accounting officers, the order of the court is only *prima facie* evidence of the amount due.
- II. The *Act 22d February, 1875* (§ 7), expressly prohibits an allowance for mileage or travel not actually and necessarily performed; travel is not actually and necessarily performed when a marshal can serve more than one subpoena for the same party upon different persons at the same time and place and make but one journey for the service of all.
- III. A marshal having prisoners in custody before a commissioner is prohibited by Revised Statutes, § 1030, from charging a fee when they are remanded; and should the commissioner needlessly issue warrants of commitment, the prohibition of the statute will still apply.
- IV. A State statute cannot control an express law of Congress in relation to proceedings in Federal courts. The provisions of the Revised Statutes, § 1014, allowing criminal proceedings "*agreeably to the usual mode of process against offenders in each State*" refers to process and procedure not expressly regulated by Federal statutes.

The Reporters' statement of the case:

This action the claimant brought by the voluntary filing of his petition. The following are the facts as found by the court:

I. The claimant was marshal of the United States for the middle and southern districts of Alabama from April 26, 1876, to May 1, 1880.

II. He rendered an account against the United States for fees and disbursements as such marshal, with the vouchers and items thereof, to the district court for the middle district of Alabama, in accordance with the provisions of the act of February 22, 1875, ch. 95, sec. 81 (Supplement to Rev. Stat., 145), and the court caused to be entered of record in relation thereto the following order:

"November term, 1878.—At a district court of the United States for the middle district of Alabama, begun and holden at Montgomery, Alabama, on the 4th day of November, A. D. 1878. Present and presiding, the Hon. John Bruce, judge of said court.

"MONDAY, January 13, 1879.

"IN THE MATTER OF THE ACCOUNTS OF }
George Turner, esq., U. S. Marshal. }

"Whereas George Turner, United States marshal, has rendered to this court an account of his fees and disbursements at and previous to

the November term, 1878, of the United States circuit and district courts, with the vouchers and items thereof and in presence of Charles E. Mayer, esq., United States attorney, has proved on oath to the satisfaction of the court, that the services and travel therein charged have been actually and necessarily performed as therein stated, and that the disbursements charged have been fully paid in lawful money; and whereas said charges appear to be just and according to law, it is hereby ordered that the said account amounting to twenty-eight thousand and twenty-four dollars and sixty-eight cents (\$28,024.68), be, and the same is hereby, approved."

This account, thus approved, with the vouchers, was forwarded to the proper accounting officers of the Treasury, who revised the same and disallowed items of two classes to the amount of \$1,335.24. The claimant was paid the balance of his account after deducting the amount so disallowed.

III. One class of items thus disallowed at the Treasury and unpaid, amounting to \$307.24, was for mileage or travel in serving subpoenas at the same time and place that he served other subpoenas on behalf of the United States, containing the names of other and different witnesses in other cases in which the United States were parties. He was allowed and paid for travel and mileage in the service of the latter subpoenas as provided by Revised Statutes, section 829, and no additional travel was actually or necessarily performed in the service of the former.

IV. The other class of items so disallowed at the Treasury and unpaid, amounting to \$1,028, was for the service, at \$2 each, under the provisions of Revised Statutes, section 829, of warrants of commitment, duly issued by a United States commissioner, under circumstances as follows: Persons accused of crimes and offenses were brought before such commissioner upon warrants of arrest which commanded the marshal to apprehend the persons named and bring them forthwith before him at his office, and nothing further. The commissioner having the defendants before him, in the custody of the marshal, ordered them to find bail for their appearance, some few on the same day, and the others on the next or a subsequent day, and for want thereof he issued to the marshal warrants in the following form:

"UNITED STATES OF AMERICA,

"In the middle district of Alabama:

"The President of the United States to the marshal of said district, greeting:

"Whereas complaint on oath hath been made before me, W. H. Hunter, U. S. circuit court commissioner for the middle district of Alabama, charging that —, in the county of —, and State of Alabama, district aforesaid, on or about —, knowingly violated the laws of the United States, to wit, section — of the Revised Statutes of the United States; and whereas warrant of arrest thereupon issued, commanding you to apprehend the said defendant, and bring him forthwith before me, at my office, in the city of Montgomery;

"And whereas you have executed said warrant, and have brought the

said defendant before me, as therein directed, and the said defendant being required to find bail in the sum of ——— for his appearance before the commissioner of the circuit court of the United States for the middle district of Alabama, on the — day of —, 188—, and the said defendant having failed to give the bail so required:

"You are therefore commanded to receive into your custody the said defendant, and to detain him until he is legally discharged.

"Dated at Montgomery, in said district, this — day of —, A. D. 188—.

"W. H. HUNTER,

"United States Commissioner for said District."

Argument for the claimant:

The marshal thereupon took and retained the prisoners in his custody, upon said warrants of commitment, without committing them to jail, and for that service said items are charged.

Mr. Charles E. Mayer and the claimant in *pro. per.* for the claimant:

The approval by the court of the accounts of a marshal are the judgment of the court, and as such not subject to review by the accounting officers of the Treasury. (Act of February 22, 1875, United States Statutes, vol. 18, p. 333, Part III; *Hayburn's Case*, 2 Dallas, p. 410 and note; *Ferreira's Case*, 13 Howard, p. 40 and note.)

It is not pretended, and there is no evidence to the effect, that the subpoenas for which the marshal claims fees for travel had the names of the same person to be served in any two of them. Therefore the marshal is entitled to his fees for travel in serving the writs. (Attorney-General Devens, 16 Op., 169.)

The statute clearly vests in the clerk of the court the discretion to determine how many names are to be put in one subpoena, and neither the marshal, the First Comptroller, nor this court have any authority to revise the action of the clerk in this respect. (Smith's Commentaries, sec. 581; *Logue v. Jerome*, 26 Wendell, p. 485; *Dunnegan v. The United States*, C. Cls. R., 17, p. 247.)

It was the duty of the marshal to execute all lawful process, which, as the executive officer of the court, he might be required under its rules or established modes of procedure to perform, and he should not be deprived of compensation for such services, on the ground that they were unnecessary. (Att'y-Gen., 3d Op., 536-39; *Riggs v. Supervisors*, 1 Woolworth, 380; Att'y-Gen Gilpin, 3d Op., p. 497; Att'y-Gen. Devens, 16 Op., p. 165.)

The procedure by which persons charged with any crime or offense against the United States are arrested, and by imprisonment or bail held to answer to a court of the United States, is the same as the mode of process for holding persons to answer in the State court for violation of the laws of the State in which they may be found. (Sec. 1014 Rev. Stat. United States; *Frazer's Case*, 2 Abbott, p. 363; *The United States v. Case*, 8 Blatchford, p. 250; *The United States v. Rundlett*, 2 Curtis, p. 42.) The warrant of arrest is fully executed when the prisoner is brought

before the magistrate and the authority of the arresting officer thereunder is exhausted. This being the case, the statute provides that the examination may be adjourned from time to time; that, in case the offense is not bailable, or, if bailable, the defendant is unable to give bail, he shall be committed; and that the verbal order of the magistrate shall be sufficient to bring the prisoner before him on the days to which the examination shall be adjourned; in other words, when the prisoner has been once committed no further writ is necessary to bring the prisoner into court or remand him from the court into custody.

No fee has been asked by the marshal for bringing into court any person in custody, nor for remanding any person from the court into custody. The fees claimed are for executing the original warrant of commitment, without which—the warrant of arrest having been fully executed—the marshal would have no authority to detain the prisoner.

Petitioner does not claim for a warrant to remand (send back) the prisoner into custody, but for a warrant without which he could not be in custody at all.

It is clear that sec. 1030 R. S. applies only to those cases wherein the prisoner is already in lawful custody by virtue of some warrant previously issued.

A warrant of commitment is necessary to authorize the marshal to take the custody of the prisoner when he is committed by the magistrate. (Bishop on Crim. Pro., sec. 228 and p. 235.)

Mr. F. H. Hoice (with whom was the *Assistant Attorney-General*) for the defendants:

1. If the claimant's theory of the law is right, this petition must be dismissed. His remedy is by mandamus. If the accounting officers have refused to pay the judgment of the district court of Alabama, they may and will refuse to pay the judgment of this court. The law does not contemplate the piling up of judgments against the United States by different courts for one and the same cause of action. If the claimant has a valid judgment against the United States he is not required to sue upon it in this court. The Court of Claims has no power to enforce judgments of other courts. The statutes conferring jurisdiction upon this court do not embrace claims founded upon judgments of other courts against the United States. It is submitted that the assumption that Congress cannot charge a United States court with other than judicial duty is not founded upon authority, at least to the extent claimed here.

There can be no mistaking the legislative intent in this act. The last clause of the first section expressly declares that the act shall not "diminish or affect the right of revision" by the accounting officers "as exercised by the laws now in force."

It is submitted that there can be no doubt of the right of the accounting officers of the Treasury to exercise the same power over these accounts which they had before the passage of the act of 1875.

The Congress, under the Constitution, can delegate to courts, as such, only judicial power; but where other than judicial duties are imposed by Congress upon courts or judges, the latter perform such duties, not in their judicial character, but as commissioners only.

Upon the right of the accounting officers to revise and reject accounts of marshals see *United States v. Smith*, 1 Woodb. and M., 184.

2. This is an attempt to charge the Government mileage for travel not in fact performed. The statute expressly prohibits it. The courts in similar cases have uniformly ruled against it. (*Hoice v. Douglas Co.*, 3 Oregon, 488; *United States v. Harke*, 3 Sawyer, 237; *Vannatta v. Brewer*, 85 Ills., 114; *Barnes v. Marion Co.*, 54 Iowa, 482.)

RICHARDSON, J., delivered the opinion of the court:

Three questions of law arise upon the findings in this case.

1. The claimant presented an account against the United States, for fees and disbursements as marshal, to a United States district court in Alabama, and it was approved by said court under the following provisions of the statutes:

"Be it enacted, &c. [SECTION 1.] That before any bill of costs shall be taxed by any judge or other officer, or any account payable out of the money of the United States shall be allowed by any officer of the Treasury in favor of clerks, marshals, or district attorneys, the party claiming such account shall render the same, with the vouchers and items thereof, to a United States circuit or district court, and in presence of the district attorney or his sworn assistant, whose presence shall be noted on the record, prove in open court to the satisfaction of the court by his own oath or that of other persons having knowledge of the facts, to be attached to such account, that the services therein charged have been actually and necessarily performed as therein stated; and that the disbursements charged have been fully paid in lawful money, and the court shall thereupon cause to be entered of record an order approving or disapproving the account as may be according to law and just.

"Nothing contained in this act shall be deemed in any wise to diminish or affect the right of revision of the accounts to which this act applies by the accounting officers of the Treasury, as exercised under the laws now in force." (Act of February 22, 1875, ch. 95; Supplement to Rev. Stat., 145.)

The claimant contends that the approval by the court of the account of the marshal under that statute was a judgment of the court, and as such not subject to review by the accounting officers of the Treasury. We do not concur in that view of the law.

In our opinion the duty imposed upon the court of examining and approving and disapproving of accounts which are not to be taxed in cases pending therein, and are not chargeable to any fund within its control, but are payable out of the public Treasury after review by the accounting officers, is not a judicial power the exercise of which constitutes the approval or disapproval [of] a judicial determination of the rights of the parties. A similar question, almost identical with this in principle, was discussed in the case of *The United States v. Ferreira* (13 Howard, 40),

and we understand the views there expressed in the opinion of the court to warrant the conclusion which we have reached on that point. (See also *Gordon's Case*, 7 C. Cls. R., 1, and *Langford's Case*, 101 U. S. R., 344.)

The statute having made such accounts, after approval or disapproval, subject to revision by the accounting officers of the Treasury, in the ordinary processes of accounting, the order of the court is only *prima facie* evidence of the amount due thereon from the United States. That evidence may be rebutted by either party when the account is reviewed, either in the Treasury Department or by this court, in a suit brought upon it. (*United States v. Smith*, 1 Woodbury & Minot, 184.)

We hold, therefore, that the claimant's approved account is not conclusive upon the defendants, but may be impeached for any errors therein which appear from the facts found by this court.

2. On the part of the defendants it is urged that an error of \$307.24 in the account is shown by finding III, in the approval by the district court of that sum for mileage and travel in serving subpoenas, when the claimant was allowed and paid by other items of the same account for all the actual and necessary travel performed by him, in the service of said subpoenas, at the same time with the service of other subpoenas for the United States, upon other and different witnesses named therein, in other cases in which the United States were parties.

This raises the question whether or not a marshal having two subpoenas from the same party in different cases to summon different witnesses who are found in the same place, and all are summoned at the same time, so that the marshal travels over the route but once in the performance of his duties in relation to both subpoenas, he is entitled to mileage for travel twice over the route, once for the service of each.

On this point opposite opinions have prevailed. The Solicitor-General, Mr. Phillips, advised the Secretary of the Treasury that the marshal was entitled to allowance for but one journey, the actual and necessary travel performed by him. (15 Opin., 108.) The Attorney-General, Mr. Devens, on the contrary, advised the Secretary of the Treasury that the marshal in such cases was entitled to allowance to mileage for travel twice over the route, once in the service of each subpoena, and that it made no difference that he actually and necessarily made but one journey for both. (16 Opin., 165.)

The First Comptroller of the Treasury, in revising the account of the claimant now before us, held that he was entitled to mileage only for one travel or journey in both cases, and he disallowed all but the actual and necessary travel performed.

We are of opinion that the Comptroller was right. The Revised Statutes, section 829, provide as follows:

"For travel, in going only, to serve any process, warrant, attachment, or other writ, including writs of subpoena in civil or criminal cases, six cents a mile, to be computed from the place where the process is re-

turned to the place of service; or, when more than one person is served therewith, to the place of service which is most remote, adding thereto the extra travel which is necessary to serve it on the others. But when more than two writs of any kind required to be served in behalf of the same party on the same person might be served at the same time, the marshal shall be entitled to compensation for travel on only two of such writs; and to save unnecessary expense it shall be the duty of the clerk to insert the names of as many witnesses in a cause in such subpoena as convenience in serving the same will permit."

If this were the only provision on the subject we might hold otherwise, since the case now under consideration is not one of those in which a marshal is prohibited from charging two journeys where only one is actually performed. But since the passage of the Revised Statutes, and before the claimant's services were rendered, Congress further limited the rights of marshals as well as of attorneys, clerks of courts, their assistants and deputies, in their charges for travel, by enacting as follows:

June 16, 1874, chapter 285, section 1, proviso in sixth paragraph:

"*Provided*, That only actual traveling expenses shall be allowed to any person holding employment or appointment under the United States, and all allowances for mileage and transportation in excess of the amount actually paid are hereby declared illegal, and no credit shall be allowed to any of the disbursing officers of the United States for payment or allowances in violation of this provision." (1 Supplement to Rev. Stat., 37.)

February 22, 1875, chapter 95:

"SEC. 7. That the proviso in the sixth paragraph of the act entitled 'An act making appropriations for the support of the Army for the fiscal year ending June thirtieth, eighteen hundred and seventy-five, and for other purposes,' approved June sixteenth, eighteen hundred and seventy-four, shall not be construed to apply or to have applied to attorneys, marshals, or clerks of courts of the United States, their assistants or deputies. * * *

And from and after the first day of January, 1875, no such officer or person shall become entitled to any allowance for mileage or travel not actually and necessarily performed under the provisions of existing law." (1 Supplement to Rev. Stat., 147.)

This last act does something more than declare that the proviso in the sixth paragraph of the act of 1874 shall not apply to attorneys, marshals, and clerks of courts, their assistants or deputies. It does that, but instead of leaving the fees of those officers for travel to be governed wholly by the provisions of the Revised Statutes, it goes on to further regulate them by expressly enacting that no such officer or person shall become entitled to any allowance for mileage or travel not actually and necessarily performed under the provisions of existing law.

In our opinion, this latest enactment of Congress was intended to apply to just such a case as this, among others, and that it effectually prevents marshals from charging mileage for more than one journey, that is, for travel not actually and necessarily performed, when they serve

two or more subpoenas for the same party upon different persons at the same time and place, and make but one journey for the service of both or all.

How it would be when they serve subpoenas for different parties at the same time and in the same manner we express no opinion, because that question is not involved in the controversy now before us.

The claimant has, therefore, no cause of action for his charges for travel which the Comptroller rejected.

3. Since the former trial the facts upon which the fourth finding is based have been proved to be quite different from what we understood them at that time. The warrant of commitment put in evidence by both parties is not the same on this trial as it was on the former hearing, and the difference is material both in form and substance. The fourth finding as it now appears presents this branch of the case for our determination of the law applicable thereto.*

It is urged, on the part of the defendants, that, by finding IV, an error of \$1,028 is shown in the account approved by the district court for the service of warrants of commitment, at \$2 each, charged by the claimant under the following provision of the Revised Statutes, section 829, in relation to marshal's fees:

"For service of any warrant, attachment, summons, *capias*, or other writ, except execution, *venire*, or a summons of subpoena for a witness, two dollars for each person on whom service is made."

In support of this objection, notwithstanding that provision of the statute, it is contended that no warrants were necessary in the cases in which they were issued, and for the service of which these charges are made; that the prisoners should have been remanded on the order of the commissioner; and that each warrant, whatever be its form, must be considered merely as such order, for which the marshal is prohibited from charging any fee, by the terms of the following provision of section 1030 of the Revised Statutes:

"No writ is necessary to bring into court any prisoner or person in custody, or for remanding him from the court into custody; but the same shall be done on the order of the court or district attorney, for which no fee shall be charged by the clerk or marshal."

The claimant contends that the commitment of prisoners upon warrants of the commissioner in these cases was not a remanding, within the meaning of that section, but was a necessary proceeding in conformity with the law and practice of Alabama, which he claims are adopted for the United States courts by Revised Statutes, as follows:

"SEC. 1014. For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate of any State

* There had been a previous trial of this case at the same term. But the findings of fact filed as the result of the first trial were set aside and a new trial granted in which the facts above set forth were filed.

where he may be found, and agreeably to the usual mode of process against offenders in such States, and at the expense of the United States, be arrested and imprisoned or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense."

The code of Alabama of 1876, which the claimant contends contro is the proceedings of the Federal courts in that State, contains the following provision now in force :

"SEC. 4673. When a defendant is brought before a magistrate under a warrant of arrest for examination, such magistrate may adjourn the examination from time to time as may be necessary, not exceeding ten days at one time, without the consent of the defendant, and to the same or a different place in the county ; and in such case, if the defendant is charged with a capital offense, he must be committed to a jail in the mean time ; but if the offense is not capital he may give bail in such sum as the magistrate directs for his appearance for such further examination, and for the want thereof must be committed ; and on the day to which the examination was adjourned he may be brought before the magistrate by his verbal order to the same officer who had charge of him, or by an order in writing to a different person, if the custody has been changed."

It is by no means clear that this provision of the law of Alabama requires a temporary warrant of commitment to be issued upon the adjournment of a case against a prisoner brought before the commissioner on a warrant of arrest. It does not in terms so provide, and unless the prisoner could not be held on the original warrant of arrest from day to day until discharged the statute would not seem to make any other warrant necessary.

Bishop, in his work on Criminal Procedure (Vol. I, p. 216), upon authorities there cited, thus states the rights and duties of an officer as to holding a prisoner whom he has in his custody on a warrant of arrest as follows :

"When the prisoner, says Chitty, is brought before the justice, he is still considered to be in the custody of the officer until he has been either discharged, bailed, or committed to prison. The officer may keep his warrant for his own justification, and need only return to the justice what he has done in pursuance of his commands."

But even if the statute of Alabama does alter this general rule of law for that State, it cannot control an express provision of a law of Congress in relation to proceedings in the Federal courts. The requirement of Revised Statutes, § 1014, that for any crime or offense against the United States the offender may be arrested and imprisoned, or bailed, in the State where he is found, "agreeably to the usual mode of process against offenders in such State," we understand to apply to such procedure and processes only as are not differently provided for by the Federal statutes. It was not the intention of Congress, we think, to make an express provision in relation to a course of proceedings before the United States courts and then allow each State to change it at pleasure. (*Wear v. The Mayor*, 6 Fed. R., 660.)

By Revised Statutes, § 1030, Congress had declared that "no writ is necessary to bring into court any prisoner or person in custody, or for remanding him from the court into custody; but the same shall be done on the order of the court or district attorney, for which no fee shall be charged by the clerk or marshal," and this is the rule for all United States courts and commissioners.

In the present case the marshal had the prisoners before the commissioner upon warrants of arrest, on the authority of which it was his duty to hold them until bailed, discharged, or bound over to a higher court. If the hearing was adjourned from one part of the day to another part, or to the next or any succeeding day, the commissioner had but to remand the prisoners with directions to the marshal when to reproduce them in court; and for this the statute declares that no writ is necessary. It might have been done, and should have been done by an order of the court or district attorney, for which no fee could be charged by the marshal.

The commissioner is not absolutely prohibited from issuing warrants of commitment, but when he does so it must still be regarded as a remanding within the meaning of the provisions of Revised Statutes, § 1030, and the consequences of that section will apply one of which is that the marshal shall charge no fee on account of it.

Where special reasons exist why a warrant of commitment should be issued to the marshal and the jailor for the purpose of having the prisoner actually committed to jail, as was the case in the trial of Aaron Burr, cited by the claimant (1 Burr's Trial, 351, 358, 359), and as is frequently the case where the marshal has no sufficient conveniences for the safe-keeping of prisoners outside of a jail, and a commitment to prison is actually made it would seem not to be a simple case of remanding, and for the services of such a warrant by actual commitment the marshal might charge his fee. But that is not the case of the claimant, and he has no cause of action for the service of the warrants upon which his demand is founded.

On the whole case we are of opinion that the Comptroller was right in rejecting the claims, and the petition must be dismissed and judgment will be so entered.

NOTE BY THE FIRST COMPTROLLER.—The foregoing case is inserted in this volume because of its importance in the adjustment of the accounts of marshals of the United States. An opinion was delivered by the court in the same case on the 18th February, 1884, as follows:

COURT OF CLAIMS.

GEORGE TURNER }
v. } No. 12774.
THE UNITED STATES. }

FINDINGS OF FACT.—This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I. The claimant was marshal of the United States for the middle and southern districts of Alabama, from April 26, 1876, to May 1, 1880.

II. He rendered an account against the United States for fees and disbursements as

such marshal, with the vouchers and items thereof, to the district court for the middle district of Alabama, in accordance with the provisions of the act of February 22, 1875, ch. 95, sec. 21 (Supplement to Rev. Stat., 145), and the court caused to be entered of record in relation thereto the following order:

"November term, 1878.—At a district court of the United States for the middle district of Alabama, begun and holden at Montgomery, Alabama, on the 4th day of November, A. D. 1878. Present and presiding, the Hon. John Bruce, judge of said court.

"MONDAY, January 13th, 1879.

"IN THE MATTER OF THE ACCOUNTS OF }
George Turner, esq., U. S. Marshal. }

"Whereas George Turner, United States marshal, has rendered to this court an account of his fees and disbursements at and previous to the November term, 1878, of the United States circuit and district courts, with the vouchers and items thereof, and in presence of Charles E. Mayer, esq., United States attorney, has proved on oath to the satisfaction of the court, that the services and travel therein charged have been actually and necessarily performed as therein stated, and that the disbursements charged have been fully paid in lawful money; and whereas said charges appear to be just and according to law, it is hereby ordered that the said account, amounting to twenty-eight thousand and twenty-four dollars and sixty-eight cents (\$28,024.68), be, and the same is hereby, approved."

This account, thus approved, with the vouchers, was forwarded to the proper accounting officers of the Treasury, who revised the same and disallowed items of two classes to the amount of \$1,335.24. The claimant was paid the balance of his account and no more.

III. One class of items thus disallowed at the Treasury, and unpaid, amounting to \$307.24, was for mileage or travel in serving subpoenas, at the same time and place that he served other subpoenas on behalf of the United States, containing the names of other and different witnesses in other cases in which the United States were parties. He was allowed and paid for travel and mileage in the service of the latter subpoenas as provided by Revised Statutes, section 829, and no additional travel was actually or necessarily performed in the service of the former.

IV. The other class of items so disallowed at the Treasury and unpaid, amounting to \$1,029, was for the service, at \$2 each, under the provisions of Revised Statutes, section 829, of warrants of commitment, duly issued by a United States commissioner, under circumstances as follows: Persons accused of crimes and offenses were brought before such commissioner upon warrants of arrest which commanded the marshal to apprehend the persons named and bring them forthwith before him at his office, and nothing further. When, upon the execution of each of such warrants of arrest, the commissioner, having the defendants named therein before him, ordered them to find bail for their appearance before the circuit court of the United States at a day certain, and they failed to do so, the commissioner issued a warrant like the following, which is a copy of one of the warrants for the service of which the claimant made his charges in said account.

"*Warrant of commitment.*

"UNITED STATES OF AMERICA,
"In the middle district of Alabama :

"The President of the United States to the marshal of said district, greeting:

"Whereas complaint on oath hath been made before me W. H. Hunter, U. S. circuit court commissioner for the middle district of Alabama, charging that Riley Forshe, in the county of Coosa and State of Alabama, district aforesaid, on or about 1879, knowingly violated the laws of the United States, to wit, section 3242 of the Revised Statutes of the United States; and whereas warrant of arrest thereupon issued, commanding you to apprehend the said defendant, and bring him forthwith before me, at my office in the city of Montgomery;

"And whereas you have executed said warrant, and have brought the said defendant before me, as therein directed, and the said defendant being required to find bail in the sum of two hundred dollars for his appearance before the circuit court of the

United States for the middle district of Alabama, on the 8th day of November, 1880, and the said defendant having failed to give the bail so required:

"You are therefore commanded to receive into your custody the said defendant, and to detain him until he is legally discharged.

"Dated at Montgomery, in said district, this 22d day of October, A. D. 1880.

"W. H. HUNTER,

"United States Commissioner for said District."

The marshal, thereupon, took and retained the prisoners in his custody, upon said warrants of commitment, without committing them to jail, and for that service said items are charged.

CONCLUSION OF LAW.—Upon the foregoing findings of fact the court decides as a conclusion of law that the claimant is entitled to recover the sum of \$1,028, and no more.

RICHARDSON, J., delivered the opinion of the court.

Three questions of law arise upon the findings in this case.

1. The claimant presented an account against the United States, for fees and disbursements as marshal, to a United States district court in Alabama, and it was approved by said court under the following provisions of the statutes:

"Be it enacted, &c. [SECTION 1.] That before any bill of costs shall be taxed by any judge or other officer, or any account payable out of the money of the United States shall be allowed by any officer of the Treasury in favor of clerks, marshals, or district attorneys, the party claiming such account shall render the same, with the vouchers and items thereof, to a United States circuit or district court, and in presence of the district attorney or his sworn assistant, whose presence shall be noted on the record, prove in open court to the satisfaction of the court by his own oath or that of other persons having knowledge of the facts, to be attached to such account, that the services therein charged have been actually and necessarily performed as therein stated; and that the disbursements charged have been fully paid in lawful money, and the court shall thereupon cause to be entered of record an order approving or disapproving the account as may be according to law and just. * * *

"Nothing contained in this act shall be deemed in anywise to diminish or affect the right of revision of the accounts to which this act applies by the accounting officers of the Treasury, as exercised under the laws now in force. * * * (Act of February 22, 1875, ch. 95; Supplement to Rev. Stat., 145.)

The claimant contends that the approval by the court of the account of the marshal under that statute was a judgment of the court, and as such not subject to review by the accounting officers of the Treasury. We do not concur in that view of the law.

In our opinion the duty imposed upon the court, of examining and approving or disapproving of accounts which are not to be taxed in cases pending therein, and are not chargeable to any fund within its control, but are payable out of the public Treasury after review by the accounting officers, is not a judicial power the exercise of which constitutes the approval or disapproval a judicial determination of the rights of the parties. A similar question, almost identical with this in principle, was discussed in the case of *The United States v. Ferreira* (13 Howard, 40), and we understand the views there expressed in the opinion of the court to warrant the conclusion which we have reached on that point. (See also *Gordon's Case*, 7 C. Cls. R. 1, and *Langford's Case*, 101 U. S. R., 344.)

The statute having made such accounts, after approval or disapproval, subject to revision by the accounting officers of the Treasury in the ordinary processes of accounting the order of the court is only *prima facie* evidence of the amount due thereon from the United States. That evidence may be rebutted by either party when the account is reviewed, either in the Treasury Department or by this court, in a suit brought upon it. (*United States v. Smith*, 1 Woodbury and Minot, 184.)

We hold, therefore, that the claimant's approved account is not conclusive upon the defendants, but may be impeached for any errors therein which appear from the facts found by this court.

2. On the part of the defendants it is urged that an error of \$307.24 in the account is shown by Finding III, in the approval by the district court of that sum for mileage

and travel in serving subpoenas, when the claimant was allowed and paid by other items of the same account for all the actual and necessary travel performed by him, in the service of said subpoenas, at the same time with the service of other subpoenas for the United States, upon other and different witnesses named therein, in other cases in which the United States were parties.

This raises the question whether or not a marshal having two subpoenas from the same party in different cases to summon different witnesses who are found in the same place, and all are summoned at the same time, so that the marshal travels over the route but once in the performance of his duties in relation to both subpoenas, he is entitled to mileage for travel twice over the route, once for the service of each.

On this point opposite opinions have prevailed. The Solicitor-General, Mr. Phillips, advised the Secretary of the Treasury that the marshal was entitled to allowance for but one journey, the actual and necessary travel performed by him. (15 Opin., 108.) The Attorney-General, Mr. Devens, on the contrary, advised the Secretary of the Treasury that the marshal in such cases was entitled to allowance to mileage for travel twice over the route, once in the service of each subpoena, and that it made no difference that he actually and necessarily made but one journey for both. (16 Opin., 165.)

The First Comptroller of the Treasury, in revising the account of the claimant now before us, held that he was entitled to mileage only for one travel or journey in both cases, and he disallowed all but the actual and necessary travel performed.

We are of opinion that the Comptroller was right. The Revised Statutes, section 829, provides as follows:

"For travel, in going only, to serve any process, warrant, attachment, or other writ, including writs of subpoena in civil or criminal cases, six cents a mile, to be computed from the place where the process is returned to the place of service; or, when more than one person is served therewith, to the place of service which is most remote, adding thereto the extra travel which is necessary to serve it on the others. But when more than two writs of any kind required to be served in behalf of the same party on the same person might be served at the same time, the marshal shall be entitled to compensation for travel on only two of such writs; and to save unnecessary expense it shall be the duty of the clerk to insert the names of as many witnesses in a cause in such subpoena as convenience in serving the same will permit."

If this were the only provision on the subject we might hold otherwise, since the case now under consideration is not one of those in which a marshal is prohibited from charging two journeys where only one is actually performed. But since the passage of the Revised Statutes, and before the claimant's services were rendered, Congress further limited the rights of marshals as well as of attorneys, clerks of courts, their assistants and deputies, in their charges for travel, by enacting as follows:

June 16, 1874, chapter 285, section 1, proviso in sixth paragraph:

"*Provided*, That only actual traveling expenses shall be allowed to any person holding employment or appointment under the United States, and all allowances for mileage and transportation in excess of the amount actually paid are hereby declared illegal, and no credit shall be allowed to any of the disbursing officers of the United States for payment or allowances in violation of this provision." (1 Supplement to Rev. Stat., 37.)

February 22, 1875, chapter 95:

"SEC. 7. That the proviso in the sixth paragraph of the act entitled 'An act making appropriations for the support of the Army for the fiscal year ending June thirtieth, eighteen hundred and seventy-five, and for other purposes' approved June sixteenth, eighteen hundred and seventy-four, shall not be construed to apply or to have applied to attorneys, marshals, or clerks of courts of the United States, their assistants or deputies.

"And from and after the first day of January, 1875, no such officer or person shall become entitled to any allowance for mileage or travel not actually and necessarily performed under the provisions of existing law." (Supplement to Rev. Stat., 147.)

This last act does something more than declare that the proviso in the sixth paragraph of the act of 1874 shall not apply to attorneys, marshals, and clerks of courts, their assistants or deputies. It does that, but instead of leaving the fees of those officers for travel to be governed wholly by the provisions of the Revised Statutes it goes on to

further regulate them by expressly enacting that no such officer or person shall become entitled to any allowance for mileage or travel not actually and necessarily performed under the provisions of existing law.

In our opinion, this latest enactment of Congress was intended to apply to just such a case as this, among others, and that it effectually prevents marshals from charging mileage for more than one journey, that is for travel not actually and necessarily performed, when they serve two or more subpoenas for the same party upon different persons at the same time and place, and make but one journey for the service of both or all.

How it would be when they serve subpoenas for different parties at the same time and in the same manner we express no opinion, because that question is not involved in the controversy now before us.

The claimant has, therefore, no cause of action for his charges for travel which the Comptroller rejected.

3. It is further urged on the part of the defendants that another error of \$1,028 is shown in the account by Finding IV, in the approval by the district court of that sum for the service of warrants of commitment, at \$2 each, under the following provision of the Revised Statutes, section 829, in relation to marshal's fees:

"For service of any warrant, attachment, summons, *capias*, or other writ, except execution, venire, or a summons of subpoena for a witness, two dollars for each person on whom service is made."

In support of this objection, notwithstanding that provision of the statute, it is contended that no warrants were necessary in the cases in which they were issued, and for the service of which these charges are made, that the prisoner should have been remanded on the order of the court or district attorney, and that each warrant must be considered merely as such order, for which the marshal is prohibited from charging any fee, by the terms of the following provision of section 1030 of the Revised Statutes:

"No writ is necessary to bring into court any prisoner or person in custody, or for remanding him from the court into custody; but the same shall be done on the order of the court or district attorney, for which no fees shall be charged by the clerk or marshal."

If this section applies to such cases as those in which the claimant served these warrants of commitment, if such service was a remanding of the prisoners into custody within the meaning of that section, then the objection is well taken and the claimant cannot recover. To determine the question thus raised we must critically consider the exact circumstances under which the warrants were issued and served.

Persons accused of crimes or offenses were brought before a United States commissioner on warrants of arrest which merely commanded the marshal to apprehend the persons named and to bring them forthwith before him at his office. The commissioner, after a hearing it may be assumed, ordered the accused to give bail for their appearance before the circuit court of the United States for the middle district of Alabama on a day named, and in default thereof to be committed until legally discharged. It was not then sufficient merely to *remand* the prisoners into custody to be held upon the warrants of arrest previously issued. Those warrants had been fully executed and the object of their issue had come to an end.

A new reason for the detention of the accused persons had taken the place of the former one, to wit, the failing to give bail for their appearance before another tribunal at a future day named. Warrants of commitment were, therefore, issued reciting the facts and setting out why the prisoners were to be held in custody, as appears by the form of one of them, given in full in Finding IV, and commanding the marshal to receive into his custody the defendants named therein until they should be legally discharged. This was not a *remand*, but a new commitment for a default occurring after the first arrest. It was not one of those cases mentioned in section 1030 of the Revised Statutes, where not only the court, but a district attorney, by a mere order,

may cause a person in custody as a prisoner to be brought into court or may remand him from the court into custody.

That section refers only to cases where prisoners taken in and out of court during their trial, or for some special purpose, are all the time held upon the original mittimus or warrant. In such cases there is no new cause of commitment, and, therefore, no new warrant is necessary. The provision of the section that a remand may be made on the order of the district attorney, shows very clearly that it refers only to that class of cases, since the district attorney would not be invested with judicial power to change the terms of imprisonment. To remand, as used in relation to prisoners, is to recommit or send back, and nothing more. It implies that the terms of imprisonment remain unchanged. It is the proper method of procedure when a prisoner is brought before a judge on a writ of *habeas corpus* for the purpose of obtaining his liberty. If the judge finds there is cause for detention he remands him, to be held as he stood committed. So it is when an accused person, after a partial hearing, is sent back into custody to await further proceedings. (Wharton's, Bouvier's, and Abbott's Law Dictionaries.)

From these views, it follows that the claimant had a right to charge \$2 each for service of the warrants of commitment specified in his account, that the items therefor, approved by the district court and disallowed at the Treasury Department, were correct, and that he is entitled to recover the full amount of those items.

Judgment will accordingly be entered in his favor for the sum of \$1,023, and no more.

NOTE BY THE FIRST COMPTROLLER.—The foregoing opinion, so far as relates to warrants of commitment, was given under a misapprehension of fact. On page 2 it is said: "The commissioner having the defendants * * * before him ordered them to find bail for their appearance before the circuit court of the United States at a day certain, and they failed to do so, the Commissioner issued a warrant like the following, which is a copy of one of the warrants for the service of which the claimant made his charges."

The warrant referred to was *not* one of those for the service of which a fee was disallowed. This is shown in the findings of fact: the warrant bears date October 22, 1830, nearly five months after Mr. Turner was superseded in office. It was issued to and served by his successor, and a fee for serving it was allowed to the latter.

Fees for serving warrants of commitment issued on failure of defendants to give bail for their appearance before a circuit or district court have in no case been disallowed.

The fees disallowed in Marshal Turner's accounts which are now claimed were for serving temporary warrants of commitment issued by commissioners to hold prisoners from one day to another when examinations were pending before them.

A prisoner is arrested and brought before a commissioner in custody of the marshal. The commissioner is not ready to go into an examination of the case, or he gives it a partial hearing and postpones the decision to the next day, or some other day. On failure of the defendant to give bail the commissioner remands him to the custody of the marshal to detain him until legally discharged. Marshal Turner alleges that in such case a temporary warrant of commitment was issued to him, for the service of which he is entitled to a fee of two dollars. The objection is that a fee is prohibited by section 1030 of the Revised Statutes.

There was no actual commitment to jail in any case wherein a fee was disallowed.

On the 27th of February, 1884, the First Comptroller addressed a letter to the Attorney-General, calling his attention to the facts stated, and on his motion a new trial was granted, which resulted in the opinion of June 2, 1884, as found in 19 Court of Claims Report, 629.

The opinion of the 18th of February, 1884, is given herein, because it affirms, in principle, the practice which has prevailed in the Comptroller's office.

IN THE MATTER OF THE RIGHT TO A REFUND UNDER THE ACT OF JUNE 26, 1884 (23 STAT., 53, SEC. 26), OF "ANY FINE, PENALTY, FORFEITURE, EXACTION OR CHARGE ARISING UNDER THE LAWS RELATING TO VESSELS OR SEAMEN."—DINGLEY ACT CASE.

1. The United States is not generally liable for money which it has not received, but which has been tortiously or unlawfully collected by one of its officers.
2. But refunds are made under the act of June 26, 1884 (23 Stat., 53, sec. 26), whether money illegally collected has been paid into the Treasury or not.
3. Said act makes a permanent specific appropriation to pay the refunding claims therein mentioned.

The act of June 26, 1884 (23 Stat., 53), entitled "An act to remove certain burdens on the American merchant marine and encourage the American foreign carrying trade and for other purposes," and known as the "Dingley act," provides as follows:

"SEC. 26. That whenever any fine, penalty, forfeiture, exaction, or charge arising under the laws relating to vessels or seamen has been paid to any collector of customs or consular officer, and application has been made within one year from such payment for the refunding or remission of the same, the Secretary of the Treasury, if on investigation he finds that such fine, penalty, forfeiture, exaction, or charge was illegally, improperly, or excessively imposed, shall have the power, either before or after the same has been covered into the Treasury, to refund so much of such fine, penalty, forfeiture, exaction, or charge as he may think proper, from any moneys in the Treasury not otherwise appropriated."

The question is submitted to the First Comptroller to decide whether a claim for refunding a "fine, penalty, forfeiture, exaction, or charge illegally, improperly, or excessively imposed," can be paid, unless the money so illegally exacted has been paid into the Treasury.

DECISION BY WILLIAM LAWRENCE, *First Comptroller*.

The United States is not generally liable for money which it has not received, but which has been tortiously or unlawfully collected by one of its officers from a private citizen. Authorities in support of this proposition are cited in Farrar's case, post, 447, *note*. But it is competent for Congress to provide by statute that money illegally collected by its officers, but not yet paid into the Treasury, may be refunded. The act of June 26, 1884 (23 Stat., 53, sec. 26), does expressly provide for the refunding, in specified cases, of money illegally collected; and this is to be done "either before or after the same money has been covered into the Treasury." It is to be done "whenever" money so illegally exacted "has been paid to any collector of customs or consular officer, and ap-

plication has been made within one year from such payment for the refunding." The United States looks to the officer, who has illegally collected the money, to pay it into the Treasury. This act, which is to be liberally construed in furtherance of its objects, makes a permanent specific appropriation for the refunding. Claims will be paid in accordance with the principles stated.

TREASURY DEPARTMENT,

First Comptroller's Office, November 29, 1884.

IN THE MATTER OF THE APPLICATION OF A PRIVATE PERSON FOR A CERTIFIED COPY OF CERTAIN RECORDS AND FILES OF THE TREASURY DEPARTMENT.—CERTIFIED COPY CASE.

1. A regulation of the Treasury Department provides that "no account, document, or paper of any kind, on file in the Department, shall on any occasion be withdrawn by agents, attorneys, or other persons.
2. The same regulation prescribes the conditions on which copies of papers in the Department may be furnished to private individuals.
3. The form of certificate under section 886 of the Revised Statutes referred to.
4. Officers of the executive Departments cannot generally be required by subpoena *duces tecum* to remove therefrom any record or paper filed therein.

An application is made by a private person to the First Comptroller for permission to withdraw certain papers filed in this office relating to a claim pending therein, or, if such permission cannot be granted, for copies thereof.

DECISION BY WILLIAM LAWRENCE, *First Comptroller.*

Applications of the character stated are frequent. It is therefore deemed advisable to present in this connection for general information a regulation of the Treasury Department on this subject that has long been in force, and which a blank circular letter of the Department says "must be strictly observed in each and every case." The regulation is as follows:

"No copy of any paper shall be furnished to private individuals, except upon application to, and with the previous written consent of, the Secretary, one of the assistant secretaries, the chief clerk, or the head of the proper Bureau; and no account, document, or paper of any kind, on file in the Department, shall on any occasion be withdrawn by agents, attorneys, or other persons. Upon application for copies of papers on file, or any record of the Department, the rule established in the Treasury order dated October 20, 1830, must be observed, to wit: 'Copies of accounts or other papers on file or of record in the Department are to be furnished only to such persons as may be interested in them, or at their request; if they relate to suits in which the United States are interested,

such copies must be transmitted to the United States attorney having charge of such suits, subject to the inspection of the parties applying for them; and when transmitted to the district attorneys they must be sent through the solicitor of the Treasury, that he may be duly apprised of all the facts communicated to the opposite party.' *An affidavit showing the necessity of copies must be furnished in all cases.*"

Various provisions of the Revised Statutes prescribe the mode of authenticating copies of books, records, papers, and documents in the executive Departments and elsewhere, and their effect as evidence. Rev. Stat., 460, 461, 632, 639, 640, 641, 698, 882-901, 902-903, 997, 1013. Many cases are referred to under, or on the margin of, these sections illustrative of their meaning and effect. The form of certificate proper to be used under section 886 of the Revised Statutes is learnedly discussed by Mr. Justice Harlan in *United States v. Pinson*, 102 U. S., 548.

It is understood that on one occasion the Secretary of War, in answer to a subpoena *duces tecum* served on him in behalf of a private person, refused to produce in the Supreme Court of this District records of the War Department, on the ground that copies might be procured, and that their removal from their legal depository while interrupting the transaction of public business, would imperil their safety, and in so refusing he was sustained by the court. This is evidently the correct rule of law on the subject. (1 Wharton on Evidence, 377; *Austin v. Evans*, 2 Man. and Gr., 430; *Thornhill v. Thornhill*, 2 Jac. and W., 347.) In *Barney v. Schneider* (9 Wall. 248), the court, referring to certain appeals made by a party in interest, from the ruling of the collector of the port of New York to the Secretary of the Treasury, said:

"The papers showing this appeal, when filed with the Secretary, became part of the records and archives of his office, and the law is well settled that in such case the originals need not be produced in any trial, but that copies of them, certified by the officer in whose charge they properly are, may be used with the same effect as the originals. If the Government needs these copies she produces them when she proposes to use them. If any one else wants to use them the law provides the means by which such copies can be produced. They are the best attainable evidence, and must be produced, unless some sufficient reason is shown for not doing so. The Government is not bound to furnish either the *originals* or *certified copies* to suitors with whom it is contending, unless upon demand at the proper office [for certified copies], and tender of the lawful fees." [Such copies can be furnished.]

The permission now asked, to withdraw papers, is refused. Copies will be furnished when the evidence required by the regulation on the subject is submitted.

TREASURY DEPARTMENT,

First Comptroller's Office, December 3, 1884.

IN THE MATTER OF THE RIGHT OF THE OWNER OF LOTS IN CHARLESTON, SOUTH CAROLINA, TO A REFUND OF MONEY PAID BY HIM, NOVEMBER 21, 1865, TO A DIRECT-TAX COMMISSIONER FOR INTEREST AT TEN PER CENTUM FROM JULY 1, 1862, TO SAID TIME OF PAYMENT, ON DIRECT TAXES ASSESSED AGAINST SAID LOTS.—FARRAR'S CASE.

1. By force of the act of June 20, 1874 (18 Stat., 110, sec. 5), if not without reference to it, neither an *annual* nor a "*permanent annual*" appropriation is available to pay any claim except during the fiscal year in which it accrued and during two fiscal years thereafter.
2. The conclusions of Secretary Sherman in his letter of April 20, 1877 (1 Lawrence, Compt. Dec. App., 2d ed., Ch. xiv, pp. 579-591), concurred in.
3. The different classes of appropriations defined.
4. When a provision of the Revised Statutes is clear and unequivocal, resort cannot be had to the statute from which it was taken to ascertain its meaning.
5. On general principles, the statute of limitations does not run against a *cestui que trust*, until the trustee unequivocally repudiates the trust.
6. *Taylor's case* (104 U. S., 221) followed.
7. So far as the *Simons' case* (19 Court Cl., 629) may be alleged to hold—if it does so hold—that a "*permanent annual appropriation*" is "*a permanent appropriation*," or that under such appropriation moneys collected by agents of the Government "*without warrant of law . . . shall always be refunded*" by the Treasury Department, it does not conform to the practice nor to the construction of the statutes adopted in the Treasury Department. Said practice and construction will be continued as heretofore.
8. Construction given to section 2 of the deficiency appropriation act of July 7, 1884 (23 Stat., 254).
9. Claims in certain cases, for the payment of which no appropriation is available, may be allowed by the proper accounting officers and reported to the Secretary of the Treasury to be laid by him before Congress for consideration.
10. Questions arising under the direct tax acts as to interest on assessments of direct taxes may properly await the decision of cases pending in the courts on that subject.
11. The *Direct-Tax case* (second), *ante*, 81, explained.
12. Whether the surplus proceeds of direct-tax sales mentioned in section 36 of the act of August 5, 1861 (12 Stat., 304), should have been only "*deposited*" in the Treasury, or should have been, as it was, "*covered*" into the Treasury. *Quære?*
13. Money merely *deposited* but not *covered* into the Treasury may, without an appropriation for the purpose, be applied to any purpose specially authorized by statute.
14. Moneys of the United States which have not yet reached the Treasury may, by authority of a statute, be applied as it may direct, even without any formal appropriation act.

November 21, 1865, O. D. Farrar, as executor of S. S. Farrar, paid to W. D. Wording, direct-tax commissioner, \$225.12, in full for taxes and interest charged under the direct-tax act of June 7, 1862 (12 Stat., 422) on lots in the city of Charleston, South Carolina, to wit, on—

Lots.	Street.	Value.	Tax.	Interest.	Total.
166	Meeting	\$140 00	\$112 00	\$38 08	\$150 08
24	Society.	70 00	56 00	19 04	75 04

The items of tax are as originally assessed without the fifty *per cent.* penalty mentioned in the first section of the act of June 7, 1862 (12 Stat., 422). This interest is computed at 10 per cent. from July 1, 1862, to November 21, 1865.

September 24, 1870, the First Comptroller, in an opinion to the Secretary of the Treasury, on a claim for refunding direct taxes, penalty, and interest, paid January 13, 1866, on lands in Texas, held that the fifty *per centum* penalty mentioned in the first section of the act of June 7, 1862 (12 Stat., 422), "was a fixed addition to the tax to be paid in any event, whether payment was made within the sixty days [mentioned in section three of said act] or subsequently to their expiration." And he held that "this [ten *per cent.* mentioned in section 7 of the act of June 7, 1862 (12 Stat., 423), as amended by the first section of the act of February 6, 1863 (12 Stat., 640), * * *] was on his *original assessment* and commenced at the date of the President's proclamation of July 1, 1862" (12 Stat., 1266).*

*The opinion is as follows:

TREASURY DEPARTMENT, FIRST COMPTROLLER'S OFFICE,

September 24th, 1870.

SIR: I have to acknowledge the receipt of your letter of the 6th inst. referring to this office a letter of the Acting Commissioner of Internal Revenue, dated July 26, 1870, relative to the claim of William J. Jones to have refunded to him certain moneys paid to the Direct Tax Commissioners as taxes, penalty, interest and costs, under the law relating to these subjects.

It is stated that Mr. Jones, a resident of Texas and owner of lands in Galveston County in that State, paid to the Commissioners January 13, 1866—

Taxes assessed on lands valued at \$70,368	\$197 03
Penalty, 50 per cent	98 51
Interest	84 66
Costs	38 42
Total	422 62

The last three items of which Mr. Jones claims were illegally exacted of him.

The act of August 5, 1861 [12 Stat., 294], laid a tax of \$20,000,000 upon the taxable real estate within the United States, and apportioned it among the several States. Each State was authorized to assume the payment of her portion of the tax within a specified period, and provision was made for the collection of the tax (in cases where the payment should not have been assumed) by officers of the United States.

The act of June 7, 1862 [12 Stat., 422], "For the collection of direct taxes in insurrectionary districts within the United States, and for other purposes," provided for collection through the agency of tax commissioners. The second section of the act required the President on or before the first day of July, 1862, to declare by proclamation [12 Stat., 1266] what States and parts of States were in insurrection, and the proclamation issued in pursuance thereof declared the State of Texas to be in insurrection, and therefore and thereafter the provisions of that act became and were of force in that State.

The first section [12 Stat., 422] provided in substance, that, when in any State or Territory or any portion of either by reason of insurrection or rebellion the civil authority of the United States is so obstructed that the direct taxes cannot be assessed and collected under the provisions of the act of 1861, the same shall be apportioned upon all the lands and lots of ground subject to taxation in such States and Terri-

September 27, 1870, the Secretary of the Treasury, by letter to the Acting Commissioner of Internal Revenue, concurred in the conclusion of the Comptroller.

August, 1882, C. D. Farrar, by his attorney, addressed a communication to the Secretary of the Treasury, asking that sums paid as interest be refunded under section 4 of the joint resolution of February 25, 1867, 14 Stat. 568, incorporated in section 3689, Rev. Stat., p. 724.

April 25, 1883, the Secretary of the Treasury referred a claim of this character to the Court of Claims, which was decided in 1884 at the term of 1883-4, and is reported as *Simons v. United States*, 19 Court

tories, and parts thereof respectively. Each tract and lot of land was to be charged with its proportion of the original amount assessed upon the State or Territory or part thereof, "and in addition thereto a penalty of fifty per centum of said tax shall be charged thereon"—that is, the tax was increased by a penalty of fifty per cent.

By the third section [12 Stat., 422] it was made lawful for the owners, within sixty days after the Commissioners should "have fixed the amount, to pay the tax thus charged" and the fourth section provided that the title to lands, "upon which said tax as not been paid as above provided shall thereupon become forfeited to the United States."

Under these provisions of law my opinion is that the fifty per cent. was a fixed addition to the tax, to be paid in any event, whether payment was made within the sixty days or subsequently to their expiration.

It will be observed that by section six of the act of June 7, 1862 [12 Stat., 423], the Commissioners were not to enter upon their duties until the Commanding General of the particular district should have established the military authority of the United States therein, and it can hardly be assumed that Congress intended to permit the payment of taxes that were due to be postponed until some time in the indefinite future without exacting an addition thereto.

After the expiration of the sixty days and prior to a sale of the land the owner might pay the tax and interest with the addition of the fifty per cent. and the costs, if any, connected with proceedings to sell. This interest [12 Stat., 640] I am of opinion was on the original assessment and commenced at the date of the President's proclamation, July 1, 1862. I come to this conclusion because that date is fixed in that portion of section seven [12 Stat., 423, amended 640] which relates to redemption of lands sold, and because moneys bear interest from the date at which they become due, in the absence of any declaration to the contrary. By the direct tax act of August, 5, 1861, taxes were due at that date—that is, July 1, 1862.

I return herewith the letter of the Acting Commissioner and the accompanying papers, and am

Very respectfully, your ob't servant,

R. W. TAYLER,
Comptroller.

Hon. WM. A. RICHARDSON,
Acting Secretary, &c.

September 27, 1870, Hon. George S. Boutwell, Secretary of the Treasury, transmitted a copy of this letter to the Acting Commissioner of Internal Revenue, saying in reference thereto—"in the conclusions of which I concur."

For a somewhat different view of this subject see *Simons' case* (19 Court Cl., 629).

The accounts of the direct tax commissioner for Florida were transmitted, August 16, 1875, by the Commissioner of Internal Revenue to the Fifth Auditor. In 1879 they were recalled by said Commissioner, and were again received by the Fifth Auditor September 16, 1884, and have not yet reached the First Comptroller's office. These facts explain the delay in their final settlement.

Cl., 629. When the claim in the Simons' case was presented to the Secretary, and before the reference to said court, questions were raised:

"Whether, if the taxes in such cases were liable to any interest at all, it should have been charged from July 1, 1862, as above stated; or from the time the tax was "fixed" under section three of the act of June 7, 1862 (12 Stat. 422); or from the expiration of the sixty days after the tax was fixed as prescribed in said section; or, lastly, from the time the lands were advertised for sale pursuant to section 7 of the same act (12 Stat. 423-640)."

September 18, 1884, the Acting Secretary of the Treasury transmitted the papers relating to said claim of Farrar, executor, to the Commissioner of Internal Revenue, "for reference to the accounting officers."

September 29, 1884, they were referred to the Fifth Auditor, who, on the 22d of October, 1884, allowed the claims for \$57.12. The First Comptroller is thus required to decide whether payment shall be made.

Hon. William E. Earle, for the claimant, submitted an argument, insisting that the "permanent annual" appropriation made by section 3689 of the Revised Statutes "to refund to persons money collected from them without warrant of law, as in payment of dues under the direct tax laws" is now available to pay the claim in this case, notwithstanding the opinions of the Secretary of the Treasury of April 20, 1877 (1 Lawrence, Compt. Dec., 2d ed., App., 585), and December 14, 1877, (*Id.*, 579), in which he held that the act of June 20, 1874 (18 Stat., 110), so limited the use of the "permanent annual" appropriations, made by said section, that they are only available during the fiscal year in which any claim payable therefrom accrues and within two fiscal years thereafter. The following is taken from the argument:

The question here is, whether under this decision of the Court of Claims these claims can be paid out of the permanent annual appropriation provided for their payment in section 3689 R. S., or whether a special appropriation must be made.

The decision of the Secretary of the Treasury as to these "permanent annual appropriations" [1 Lawrence, Compt. Dec., 2d ed., App., ch. xiv, p. 586], would seem to preclude it, but the decision of the Court of Claims [Simons' case, 19 Court Cl.] would seem to take it out of his ruling, and under the special circumstances make it an exception to the general rule laid down by him as to permanent annual appropriations.

The reasoning of the Court of Claims upon the law makes this case an exception. * * * There was no claim prior to the joint resolution of February 25, 1867. The money had been collected, but there was no provision for its return, and this resolution, therefore, was the origin of the claim, legally considered. The work was done, and Congress either knew or regarded it most probable that in collecting all of these taxes, much of it by sales of property errors had been unavoidably committed. money collected by mistake or "without warrant of law," and therefore money which was "not really taxes," which the Government was bound in common decency and honor to return. Hence the resolution that it should be refunded upon "satisfactory evidence of the illegal collection." Then to carry this out and make the relief complete, section 3689 makes any money in the Treasury not otherwise appropriated applicable to this payment, and adds, such "appropriation shall be deemed

a permanent annual appropriation." Now the court says here is an indication of a policy of the Government, viz: That moneys collected by the Government in the name of taxes, but which are really not taxes, because collected "without warrant of law," shall *always* be refunded, and the refunding shall not be dependent upon annual appropriation acts." And the court says that "the intent of Congress is unquestionable." It quotes from the Taylor case the expression from the Supreme Court that "a construction consistent with good faith on the part of the United States should be given to these statutes."

* * * * *

A "permanent annual appropriation" contemplates that a liability will accrue in the future from time to time. Now this is exactly the case before us. On February 25, 1867, Congress knew that in all probability errors had been committed in the enforcement of this direct tax law; "that money had been received without warrant of law, as in payment of dues under it," and Congress authorized the Secretary of the Treasury to "refund" it. Now, when? Whenever satisfactory, evidence was presented "in each case." The evidence was to be satisfactory, was to be presented "in each case," and the law for each case was that the refunding was to follow. Of course this would be done from "time to time," and this very fact made a *permanent* appropriation desirable. Not "in form a permanent appropriation" but in fact. Congress was dealing in good faith in this matter. It was a relief measure—relief from the greed of the tax-gatherer. The law-making power of a great nation was remedying the hardships of war. A remedial statute is to be liberally construed. To refund the moneys collected "without warrant of law" Congress appropriates so much money as may be necessary. As much—"such sums as may be necessary." That which was collected "without warrant of law" it must be refunded, and when the evidence in each case satisfies the Secretary right then there is a "permanent annual appropriation" to pay it without delay. That is what Congress meant. No word gloss and no policy can obscure it.

But the Secretary's decision says when one of these claims "accrues it may be paid from the Treasury subject to the same general laws as to time, place and manner that apply to *other annual appropriations*."

* * * * *

Under the act of June 20, 1874, unexpended balances of appropriations having remained on the books "for two fiscal years" are covered into the Treasury, but to hold that Congress meant this to apply to "permanent annual appropriations" is to decide that the law-making power is ignorant of the meaning of one of the simplest words in our language. One of the commonest rules of construction is that each and every word shall be given force. Have "permanent" and "annual" been synonymous when applied to appropriations? Or is it that in connection with appropriations the term "permanent" prefixed to "annual" is meaningless? It would seem that this decision holds that the use of the term "permanent" should not give greater force or take it out of the general rules as to "annual appropriations."

The argument was hard-pressed when after it is admitted that "from the nature of it" a permanent annual appropriation could "not in form" be covered into the Treasury, "*but* a claim ought not to be paid out of it differently from a current annual appropriation."

Who says "ought not," and by what authority does he say it? If its *nature* prevents its being covered into the Treasury "in form," what is

the element of that nature which can prevent that being done in form which it is impotent to prevent in fact?

* * * * *

Section 3689 of the Revised Statutes is a compilation of various statutes making "permanent annual appropriations."

The examination of this long section will conclusively show that each class of claims therein provided for is one accompanied by a moral obligation, and they indicate a policy on the part of the Government to meet certain special claims promptly and immediately, without the necessity of waiting for an appropriation. The very first one is for a return of the proceeds of captured and abandoned property under the act of March 12, 1863. The next is for the payment, on proper demand and proof, of the proceeds of the personal estates of citizens who have died abroad. The next is to repay purchasers of lands at direct tax sales who have been evicted by failure of Government title. Another is for refunding money to purchasers of lands at direct tax sales where the lands have been redeemed by the original owners.

Of such nature is the class of claims embraced in this section, and that permanent annual appropriations can meet them on production of proof to the proper officer, indicates the purpose and policy of Congress, that they are to be met promptly and paid immediately on their being established. * * *

Now there is nothing in the other provision of the law relative to appropriations in conflict with this view of the intention, purpose, and policy of the law-making power, as here indicated.

Section 3685 (act of June 10, 1872) provides that no *special* appropriation shall be available for more than two years. Many of these permanent annual appropriations had been in force for eight and ten years (and some very much longer), and the absence of any reference to them in a statute limiting the availability of another class of appropriations is a very strong argument for the position that no such construction was to be forced upon the class excluded on the general principle of *inclusio unius, exclusio alterius*.

Section 3690 (July 12, 1870) provides that "all balances of appropriations contained in the *annual* appropriation bills made specifically for the service of any fiscal year and remaining unexpended at the expiration of such fiscal year" "shall be made applicable only to the expenses of that year and contracts properly made for that year."

Here now is a statutory provision limiting the use and applicability of *annual* appropriations and Congress is so careful that its policy and purpose as to "permanent appropriations" shall not be affected by any confusion growing out of it that it specially provides that this "shall not apply to appropriations known as "permanent" or "indefinite."

Section 3691, arranged in the revision so as to follow this immediately, is the Act of June 20, 1874, and it provides that "all balances of appropriation which shall have remained on the books of the Treasury without being drawn in the settlement of accounts for two years from the date of the last appropriation made by law "shall be reported by the Secretary of the Treasury to the proper Auditor of those accounts, who shall report whether such balances will be needed to settle "pending accounts," and if not it shall be carried into the general treasury, &c., &c. "But no appropriation for the payment of interest or principal of the public debt, or to which a *longer duration* is given by law, shall be so treated.

Singularly and inconsistently enough this is the very section upon which the honorable Secretary in his decision relies for authority to prac-

tically cover into the Treasury "permanent annual appropriations," not to cover into the Treasury "in form" but to "treat" them as "annual appropriations" are treated by section 3691. What is to be done with the special exception in this section? Do the words "or to which a longer duration is given by law" mean nothing? If the word "permanent" before "annual appropriation" does not give an "annual appropriation" "a longer duration" than one year, what end was in view, and what purpose was accomplished by its use? Does "permanent" mean anything?

—
DECISION BY WILLIAM LAWRENCE, *First Comptroller*.

The argument in this case assumes (1) that the direct-tax commissioners had no authority to collect, as they did, ten *per cent.* interest on the direct taxes assessed against the claimant; (2) that, as a consequence, he is entitled to have the sums paid, as interest, refunded by the United States; and, (3) that the "permanent annual" appropriation made by section 3689 of the Revised Statutes is *now* available to pay the claim.

The last-named proposition will be first considered.

Section 3689 of the Revised Statutes provides that—

"There are appropriated out of any moneys in the Treasury not otherwise appropriated, for the purposes hereinafter specified, such sums as may be necessary for the same respectively; and such appropriations shall be *deemed permanent annual appropriations*. * * *

"Refunding taxes illegally collected under the direct-tax laws:

"To refund to persons money collected from them without warrant of law, as in payment of dues under the direct-tax laws."

The section embraces many other subjects of appropriation. The act of June 20, 1874 (18 Stat., 110, sec. 5), provides that—

"After the first day of July * * * of each year the Secretary of the Treasury shall cause all unexpended balances of appropriations which shall have remained on the books of the Treasury for two fiscal years to be carried to the surplus fund and covered into the Treasury. *Provided*, That this provision shall not apply to (1) permanent specific appropriations"— * * *

nor to appropriations for four different objects mentioned, thus making five in all, and then declares that—

"The appropriations named in this *proviso* shall continue available until otherwise ordered by Congress."

It then concludes with a provision that—

"The Secretary of the Treasury shall at the beginning of each session report to Congress, with his annual estimates, any balances of appropriations for specific objects affected by this section that need to be appropriated."*

* This latter clause was repealed by section 4 of the act of June 14, 1878 (20 Stat., 130), which provided a different mode of securing payment of claims requiring a reappropriation. The authority to employ the mode so provided expired June 14, 1883. The deficiency act of July 7, 1884 (23 Stat., 254), contained a provision—

That the Secretary of the Treasury shall, at the commencement of each session of Congress, report the amount due each claimant whose claim has been allowed in

On the 20th of April, 1877, the Secretary of the Treasury decided that, by force of this act, neither "annual" nor "permanent annual" appropriations were available to pay any claim except during the fiscal year in which it accrued and during two fiscal years thereafter. This rule has been uniformly adhered to ever since. It is unnecessary to repeat the reasons given by the Secretary in support of it. (1 Lawrence, Compt. Dec., 2d ed., App., Ch. xiv, pp. 579, 585, 591; House Ex. Doc. No. 27, 45th Cong., 2d session, January 11, 1878.)

There are three general classes of appropriations, (1) annual, (2) permanent annual, and (3) permanent specific (Miss. Cent. R. R. case, 4 Lawrence, Compt. Dec., 554, 566 n.). Appropriations of each class may be either *definite* or *indefinite*, that is, they may respectively appropriate a definite fixed amount for any object or class of objects, or they may appropriate "such sum [or sums] as may be necessary" for purposes specified, and thus make an indefinite appropriation. The permanent annual appropriations made by section 3689 of the Revised Statutes are all *indefinite*, but Congress could make them *definite* by specifying a fixed sum as apportioned for any object or class of objects for the service of each future fiscal year. The only difference between a *definite annual* and a *definite permanent annual* appropriation is that the former is made by an act "for the service of" one designated fiscal year, and the latter by one permanent act for the service of each subsequent year, without limit as to the number of years. The "service of a" designated year means for the payment of claims, the right to payment of which *accrues* in that year. In the case of appropriations of both these classes, the fixed sums appropriated for each year would, by proper appropriation warrant (1 Lawrence, Compt. Dec., 2d ed., App., Ch. 1, p. 421—Appropriation Warrant), be carried on the books of the Treasury Department to the credit of the proper appropriation, and any unexpended balance would, in express terms, be subject to the "covering in" provisions of the act of June 20, 1874, 18 Stat., 110 (1 Lawrence, Compt. Dec., 2d ed., App., Ch. 1, p. 421—Appropriation Surplus Warrant). Literally, there can be no fixed sum, as an unexpended balance, under either an *indefinite annual*, or *indefinite permanent annual*, appropriation, which can be in *fact* covered into the Treasury by appropriation surplus warrant. But it does not follow that an indefinite annual appropriation is available, like a permanent specific appropriation, for an unlimited period of time. All annual appropriations are, in terms, "for the service of" a designated fiscal year. To hold either a definite or an indefinite annual appropriation available for an unlimited time would disregard the terms of the

whole or in part to the Speaker of the House of Representatives and the presiding officer of the Senate, who shall lay the same before their respective Houses for consideration. And hereafter all estimates of appropriations and estimates of deficiencies in appropriations intended for the consideration and seeking the action of any of the committees of Congress shall be transmitted to Congress through the Secretary of the Treasury, and in no other manner; and the said Secretary shall first cause the same to be properly classified, compiled, indexed, and printed, under the supervision of the chief of the division of warrants, estimates, and appropriations of his Department.

See Five-Year Claims' case, 4 Lawrence, Compt. Dec., 252, and note.

statute making it, confound all distinction between such appropriation and one *permanent specific* in character, and reverse the usages of the Department. Hence the fact that there can be no "surplus" under an indefinite annual appropriation does not take from it its character as an annual appropriation, which, by force of the act of June 20, 1874, is only available for three fiscal years. And, for the *same reasons*, an indefinite permanent annual appropriation is only available for a like period. The only difference between an *indefinite annual*, and an *indefinite permanent annual*, appropriation is one of form in the manner of making it,—the former is by an act "for the service of" a designated year, the latter is by an act for the annual service of *each* subsequent and successive year. This view has been sanctioned by usage, in reporting to Congress under the act of June 14, 1878 (20 Stat., 130), the amount allowed by the accounting officers as due to claimants, on claims arising under "permanent annual" appropriations, not paid in the year in which they accrued, nor for two fiscal years thereafter. And Congress has annually given its sanction to this construction by making appropriations to pay claims so allowed. (Deficiency act, August 5, 1882—22 Stat., 275; act March 3, 1883—22 Stat., 594).

The act of June 20, 1874, by making five *specific exceptions* to its "covering in" provision, by inference, excludes all other exceptions, upon the maxim cited by counsel in argument, *inclusio unius exclusio alterius*. (Broom, Legal Max., 651.) "*Permanent specific*" appropriations are excepted: annual and permanent annual are not so excepted—hence the latter two are included by the "covering in" provision. It is very evident that the *general purpose* of the act is to prohibit the payment of all claims except those of the five excepted classes when two years have elapsed after the fiscal year in which the right to payment accrued, unless thereafter authorized by Congress. This purpose is manifested in the several provisions pointing out the mode of securing the payment of such claims.

The argument in this case seems to assume that the Joint Resolution of February 25, 1867 (14 Stat., 568, sec. 4), makes a "permanent specific" appropriation for the payment of claims of the class now in question, and that it is thus excepted from the "covering in" provision of the act of June 20, 1874 (18 Stat., 110). Said Joint Resolution provides:

"That the Secretary of the Treasury shall be authorized to refund to persons from whom money has been received without warrant of law, as in payment of dues under the direct-tax laws, the sums so illegally collected; such refunding to be ordered on the presentation, in each case, of satisfactory evidence of the illegal collection."

By the ordinary rules of construction, this does *not make an appropriation at all*, but only *gives the authority to allow claims*, and pay *when* the proper appropriation might thereafter be made. This may be inferred from the analogy of other acts. See and compare act of March 3, 1883 (22 Stat., 595), with the act of August 5, 1861 (12 Stat.,

294, 304, sec. 36); Tax Surplus case, (5 Lawrence, Compt. Dec., 60); Direct-Tax case, (3 Lawrence, Compt. Dec., 331, 345).

The money alleged in this case to have been collected "without warrant of law" was absolutely *covered* into the Treasury by *covering warrant*. (1 Lawrence, Compt. Dec., 2d ed., App., 419.) The money was not, and could not have been, merely "*deposited*" in the Treasury, in the mode *perhaps* contemplated by section 36 of the direct-tax act of August 5, 1861 (12 Stat., 304), as to surplus proceeds of direct-tax sales, and therefore, in such case, to be paid out without an appropriation as in some similar cases. (Sanborn's case, 3 Lawrence, Compt. Dec., 207 n; United States v. Taylor, 104 U. S., 221.)

Before money could be refunded under the Joint Resolution of June 20, 1874, as it originally stood in the statutes, an appropriation for the purpose was necessary, but as transplanted into the Revised Statutes, the appropriation is made subject to the covering in provision of the act of June 20, 1874—(18 Stat., 110).

And this principle has been applied in other cases. (Canal case, 1 Lawrence, Compt. Dec., 141; Bundy's case, *Id.*, 184.)

If the Joint Resolution could be construed as making *any appropriation* it is, upon ordinary definitions, certainly by its terms *permanent specific*. But it is carried into section 3689 of the Revised Statutes as "*permanent annual*." And the provision as found in this section determines its character wholly without reference to the Joint Resolution from which it was taken. (Edmund's case, 2 Lawrence, Compt. Dec., 528.)

It may be said that section 3689 of the Revised Statutes must be deemed to make an appropriation available for the payment of this claim, or the provision thereof on this subject will be without any purpose or effect, since claims of this class had accrued more than three fiscal years prior to the date of the Revision. But the answer to this is plain. The Revision was approved June 22, 1874. (United States v. Joudon, 2 Lowell, Dist. C., 537.) It includes "the statutes of the United States, general and permanent in their nature, in force on the 1st day of December, 1873." (Rev. Stat., 5595.) It was therefore necessary to insert all such statutes, including those making permanent annual appropriations for all purposes, whether appropriations so made as to past claims remained available to make present payment or not. The question whether the appropriation made in this class of cases by the Joint Resolution of February 25, 1867 (14 Stat., 568, sec. 4; Rev. Stat., 3689), was available up to the time the Revision was adopted, or even for a time since (Rev. Stat., 3685, 3690, 3691), is not now material. If not so available, it was still proper as a part of the Revision, in order that estimates for appropriations might be transmitted to Congress to pay claims for which no available appropriation existed. (Five-Year Claims' case, 4 Lawrence, Compt. Dec., 253.) But, whatever was the state of the law up to June 20, 1874, the act of that date (18 Stat., 110, sec. 5) rendered all previous appropriations, which had stood unexpended for two fiscal years prior

to July 1, 1874, unavailable, except as in said act specially excepted. And after the act of June 14, 1878 (20 Stat., 130), claims for the payment of which an appropriation had ceased to be available could be considered by accounting officers as "claims under appropriations the balances of which have been [theoretically] exhausted" or in like manner "carried to the surplus fund." The provisions for permanent annual appropriations were properly inserted in the Revision as applicable to claims arising *in futuro*. To hold that the appropriation made by section 3689 to refund "money collected without warrant of law," is *absolutely permanent* and applies *now* to claims which accrued more than three fiscal years previously, would give a like character to all the appropriations made by that section and thus defeat the whole policy of the act of June 14, 1878.

The argument in this case cites the Taylor case (104 U. S., 221; s. c., 14 Ct. Cl., 339) in support of the position that the appropriation made by section 3689 of the Revised Statutes is now available. But that case sustains no such proposition. Section 36 of the direct-tax act of August 5, 1861 (12 Stat., 292, 304), provides that in cases of sales of real estate under that act—

"The surplus of the proceeds of the sale, after satisfying the tax, costs, charges, and commissions, shall be paid to the owner of the property, or his legal representatives, or if he or they cannot be found, or refuse to receive the same, then such surplus shall be *deposited* in the Treasury of the United States, to be *there held for the use of the owner* or his legal representatives, *until he or they shall make application therefor to the Secretary of the Treasury*, who, upon such application, shall by warrant on the Treasury, cause the same to be paid to the applicant."

The Supreme Court simply decided (1) that this provision was not repealed by the act of June 7, 1862 (12 Stat., 422), and (2) that an action in the Court of Claims for such surplus proceeds was not barred by the six years' limitation of section 1069 of the Revised Statutes. This latter point was so decided *on the ground* that section 36 above mentioned, by declaring that "surplus [proceeds of sales] shall be *deposited* in the Treasury * * * *there to be held for the use of the owner*" constituted the United States a *trustee** of the fund, and that the statute of limitations does not run against the *cestui que trust* until the "trustee unequivocally repudiates the trust and claims to hold the estate as his own." This principle, as applied to statutes of limitation, is well settled and well understood. (Angell on Limitations, 167, 468.) The question so decided related to the right of the Court of Claims to entertain an action, not to the existence of an appropriation available by the action of the Treasury Department, or to the duty of the Secretary to grant a warrant for payment thereunder. This latter point was not alluded to or touched. It is difficult to perceive how the latter question could arise in Court. An

* The trust is like that created by the Captured and Abandoned Property Act of March 12, 1863 (12 Stat., 820, sec. 3). "The Government is a trustee." (United States v. Paddleford, 9 Wall., 543; Haycraft's case, 22 Wall., 81; s. c., 8 Ct. Cl., 483).

action in the Court of Claims only asserts the right of a claimant to a judgment. The construction which executive officers place on appropriation acts, and the practice authorized in their respective departments, are generally respected and adopted by courts. (3 Lawrence, Compt. Dec., Introd., xxv, *note*. It is true the court did, in the Taylor case, say, *in support of the continued existence of the trust* therein mentioned, that—

"This section [36 of the Act of August 5, 1861] limits no time within which application must be made for the proceeds of the sale. The Secretary of the Treasury was not authorized to fix such limit. It was his duty, whenever the owner of the land, or his legal representatives, should apply for the money, to draw a warrant therefor *without regard to the period which had elapsed since the sale.*"

This is said as a *prop* to the *proposition* that the statute of limitations does not generally run against a *cestui que trust*, and not as a *foundation reason* for it, nor as necessary to its support. This *prop*, standing alone, does not support the proposition. The proposition is true without any collateral support—without any *additional evidence* that Congress intended payment to be made even beyond six years. If Congress had, in fact, made a "permanent specific appropriation" for the payment of this class of claims, *that would require the Secretary of the Treasury*, whenever a claimant "should apply for the money, to draw a warrant therefor." But a statute, giving a claimant a right to ask payment of the Secretary at any time, does not seem to give a right to sue in the Court of Claims at any time, in the face of a statute barring suits in six years. (Ellis' case, *ante*, 405; *State v. Humphreys*, 25 Ohio St., 520.) The Taylor case only decides that "the period which had elapsed since the sale" did not affect the authority to grant a warrant for payment. And this is plainly the effect of what is said. It is not said that the Secretary is required to draw a warrant without regard to the existence of an appropriation. This subject is generally regulated by section 248 of the Revised Statutes, which limits the authority of the Secretary to grant warrants for payment "in pursuance of appropriations by law." The Attorney-General has said that "if he [the Secretary] grant a warrant not in pursuance of an appropriation by law, he violates his duty, and is responsible for it." (5 Op. Att.-Gen., 641.) The act of August 5, 1861 (12 Stat., 292, 304, sec. 36), makes no appropriation to pay claimants of surplus proceeds. No part of the act is incorporated in the Revised Statutes, as appropriating money. No payments were in fact made until the act of March 3, 1883 (22 Stat., 595), made an appropriation for that purpose.*

* The money collected from direct-tax sales including the "surplus of the proceeds of" sales "after satisfying the tax, costs, charges and commissions," (act August 5, 1861, sec. 36; 12 Stat., 304) was all actually "covered" into the Treasury by covering warrant. If the question were *res integra*, in the Treasury Department, there is ground for supposing that the "surplus" of the proceeds of direct-tax sales should not have been covered into the Treasury, but should have been, as section 36 of said act of 1861 declares, "deposited in the Treasury of the United States, there to be held for the use of the owner," to be paid to him whenever he should make application therefor. Similar

The *Simons' case* (19 Court of Claims, 629) is cited in argument to show that the appropriation made by section 3689 of the Revised Statutes is now available in this case. That case is understood to be, in brief, as follows: May 6, 1865, under the direct-tax acts of August 5, 1861 (12 Stat., 292-294), June 7, 1862 (12 Stat., 423), and of February 6, 1883 (12 Stat., 640), the direct-tax commissioners for South Carolina received of William Lucas for John H. Simons the direct tax assessed on lot 6, Lynch street, Charleston, with an addition of \$40.80 for 10 *per centum per annum* interest thereon from July 1, 1862, the date of the President's proclamation (12 Stat., 1266). August 23, 1882, Simons applied to the Treasury Department to refund said \$40.80, and the claim was referred to the Court of Claims under section 1063 of the Revised Statutes, with an agreement that the reference should not waive the six years' limita-

deposits have been sometimes made under other statutes. (Sanborn's case, 3 Lawrence, Compt. Dec., 207, n.) And payments are sometimes made from money of the United States before it has reached the Treasury. (Act July 1, 1862—12 Stat., 488; *United States v. Flanders*—112 U. S., not yet published.) And this view seems to have been entertained in *United States v. Taylor* (104 U. S., 221), in which it was said it was the duty of the Secretary of the Treasury "whenever the owner of the land [sold at a direct-tax sale], or his legal representatives, should apply for the money, to draw a warrant therefor." This may well be supposed to be the *correct view*, if the surplus proceeds had been simply "deposited" in the Treasury. This was the view intended to be presented in Direct-Tax case (second) *ante*, 81. But the principles stated as to money simply "deposited" in the Treasury and the language above quoted from the opinion in *United States v. Taylor* have no application to the question arising on a claim for refunding the 10 *per centum* now in question, since no statute authorized it to be "deposited" in the Treasury to await the demand of a claimant. The reason on which the language quoted from the *Taylor* case rested, therefore, does not exist in the case of a claim for refunding said 10 *per centum*.

Most of the revenues of the Post-Office Department are not actually deposited in the Treasury, and none of them are "covered" by warrant of the Secretary of the Treasury to the debit of the Treasurer on his general account with the Government (Rev. Stat., 408, 3617).

Moneys actually deposited with the Treasurer and assistant treasurers on post-office account, do not go into the general fund of the Government, but are kept *subject to the control of the Postmaster-General* (Rev. Stat., 396, 406). As all the revenues of the Post-Office Department are used, when collected, in defraying the expenses of the postal service (Rev. Stat., 3861), those expenses are not paid by warrants of the Secretary of the Treasury (Rev. Stat., 395).

In this respect the Post-Office Department differs from all other Departments of the Government.

Its receipts and expenditures do not enter into the general account which the Treasurer renders to the First Auditor of the Treasury, to be audited and adjusted by the latter officer and the First Comptroller (Rev. Stat., 3642). But the Treasurer renders a quarterly account of them to the Auditor of the Treasury for the Post-Office Department, and the latter officer transmits quarterly statements of the postal receipts and expenses to the Secretary of the Treasury (Rev. Stat., 277; 1 Lawrence, Compt. Dec., *Introd.*, ix). The postal revenues, however, are regularly appropriated by Congress "for the service of the Post-Office Department", and a well-devised system of disbursing them is in operation (*Mississippi Central Railroad Co's case*, 4 Lawrence, Compt. Dec., 553; *Grigg's Appeal*, *ante*, 237).

tion of section 1069. The Joint Resolution of February 25, 1867 (14 Stat., 568, sec. 4), provides:

"That the Secretary of the Treasury shall be authorized to refund to persons from whom money has been received without warrant of law, as in payment of dues under the direct-tax laws, the sums so illegally collected; such refunding to be ordered on the presentation, in each case, of satisfactory evidence of the illegal collection."

This is carried into the permanent annual appropriation made by section 3689 of the Revised Statutes, by which necessary sums are appropriated: "To refund to persons money collected from them *without warrant of law*, as in payment of dues under the direct-tax laws." The court held that said sum of \$40.80 was "collected without warrant of law," that *the claim was not barred by the six years' limitation*, and judgment was rendered for the claimant. No question was or could be decided as to the *availability* of any appropriation or the *duty of the Treasury Department* thereunder. The court after quoting the provision of section 3689 of the Revised Statutes for refunding money collected without warrant of law," did say:

"The claim, *therefore*, is one for which the law provides a *permanent appropriation*, and concerning which the Revised Statutes in effect declare the policy of the Government to be: That moneys collected by its agents under the direct-tax laws, which are not really taxes, that is to say, which were 'collected without warrant of law,' *shall always be refunded*, and the refunding shall not be dependent upon annual appropriation acts. Thus far the policy of the Government is clear, and the intent of Congress unquestionable."

The argument submitted for the claimant in the case now under consideration insists that this opinion of the Court of Claims "would seem to take it [this case] out of his [Secretary Sherman's] ruling" [of April 20, 1877, 1 Lawrence, Compt. Dec., App., ch. XIV, p. 585]. It does not appear that *this ruling* or the Treasury Department *practice* under it, was called to the attention of, or considered by the Court of Claims. The court does say "the claim is one for which the law provides a *permanent appropriation*" and following this the court quotes an expression from Taylor's case that "whenever the owner of lands * * * should apply for the money, it was the duty of the Secretary to draw his warrant therefor," &c. This expression has been considered above. The exact purpose of the language so used and quoted by the Court of Claims is not fully comprehended. The opinion gives reasons why the statute of limitations did not apply in that case.

1. If the language so used and quoted was intended as a *reason why the statute of limitations did not apply*, then it would seem for the *same reason* that the limitation would not apply in *any of the numerous cases* arising under "permanent annual appropriations," nor under permanent specific appropriations, Rev. Stat., 2d ed., 3689, pp. 724-728. And this position would seem to imply that a statute making a *permanent appropriation* designed to give power to the Treasury Department to make pay-

ment for an indefinite period could extend indefinitely *the powers of the Court of Claims*, that is, engraft exceptions on the statute of limitations for said court. This would relieve a large number of cases from the limitation. There is no general statute of limitations as to the allowance of claims by accounting officers, as there is for the Court of Claims, but the power of the former to allow claims does not make appropriations indefinitely available for payment. But whatever effect, if any, the so-called "permanent [annual] appropriation" mentioned may have had as to the limitation in the Court of Claims—which is a question for that court and not for the Comptroller—it cannot now be construed as available to make payment in this case. Nor is there anything to show that such appropriation is now available.*

*1. It would seem that the Simons' case did not have the *element of trust* to relieve it of the limitation as did the Taylor case (104 U. S., 216). Hence, this latter case on this point would seem not applicable to the Simons' case.

II. *One ground at least of holding "the limitation not applicable as stated in the Simons' case is that in such cases the claimants [from whom the 10 per cent. on direct tax was prior to 1867 collected] 'without warrant of law,' were without right or remedy till the joint resolution of 1867 [14 Stat., 568, sec. 4] came in to give them both," and that under that resolution "each claim accrued" not until its "presentation to the Secretary of the Treasury."*

1. On general legal principles a party from whom money is collected without warrant of law has without express statute a right to reclaim it as upon *contract implied* even if collected under color of a statute or regulation of a Department (2 Greenl. Ev., 117; Brooks' case, 2 Ct. Cl., 180; Solomon's case, 19 Wall., 17; s. c., 9 Ct. Cl., 54; La Peyre's case, 17 Wall. 191; s. c., 8 Ct. Cl., 165; see Haycraft's case, 22 Wall. 92; s. c., 8 Ct. Cl., 483; Gibbons' case, 8 Wall. 269; s. c., 7 Ct. Cl., 405; Rev. Stat., 236; Carver's case, 16 Ct. Cl., 361.)

2. The Court of Claims has jurisdiction of claims "*founded upon any law of Congress or upon any regulation of an executive department, or upon * * * contract implied.*" (Rev. Stat., 1059, Carver's case, 16 Ct. Cl., 361.) That part of the Joint Resolution which "*authorized [the Secretary] to refund*" was *repealed* because not "*contained in said revision*" (Rev. Stat., 5596), or, as said in the Simons' case, "*merged in the Revised Statutes*" simply in a clause *making an appropriation* which did not, in terms, give the right to a refund, though the right may exist otherwise. The general rule also is that for all purposes of the statute of limitations, a claim "*accrues*" "*from the time at which a creditor is first authorized to commence a suit.*" (Angell, Limitations, 42.) In Treasury Department practice a claim "*accrues*" when there is a legal right to ask an allowance by the proper accounting officers, *not at a later date*, upon its "*presentation to the Secretary of the Treasury.*" (United States v. Savings Bank, 104 U. S., 728.)

III. The finding of facts in the Simons' case does not show that the *money sued for had ever been paid into the Treasury of the United States*. Under the Captured and Abandoned Property act it was held that a claimant could not recover against the United States "*unless the proceeds of the sale were paid into the Treasury of the United States.*" (United States v. Ross, 92 U. S., 282; Putnam's case, 5 Lawrence, Comptroller Dec., 166, note; Spencer's case, 8 Ct. Cl., 288.) The United States is not liable for money which it has not received, which has been tortiously or unlawfully collected by one of its officers. (Gibbons' case, 8 Wall., 269; Whiteside v. United States, 93 U. S., 257; Spencer's case, 8 Ct. Cl., 288; Houston's case, *Id.*, 446; Dent's case, *Id.*, 474; Whiteside's case, *Id.*, 533; Boyd's case, 9 Ct. Cl., 420; Green's case, 10 *Id.*, 466.)

The next question which will be considered is, what, if any, provision has been made looking to the satisfaction of claims for the payment of which an appropriation was once available, but which is no longer so? Under the act of June 14, 1878 (20 Stat., 130), the proper accounting officers were required for a period of five years thereafter to "receive, examine, and consider the justice and validity of" all such claims, and the Secretary of the Treasury was required to report them when duly allowed to the Speaker of the House of Representatives at the commencement of each session of Congress. The object of this was to enable Congress to make appropriations for their payment so far as deemed proper. In this mode Congress reserved a control over the payment of claims of the character stated.*

When the period of five years above mentioned had expired, it was regarded as somewhat doubtful whether such claims could thereafter be considered and allowed, though forcible reasons were presented in favor of the exercise of such jurisdiction. (Five-Year Claims' case, 4 Lawrence, Compt. Dec., 252.) The duty imposed by the act of June 14, 1878, on the Secretary of the Treasury, to report such allowed claims to the Speaker of the House, terminated with the expiration of the period mentioned. (*Id.*, 253.) It was in view of these conditions that the deficiency appropriation act of July 7, 1884 (23 Stat., 254), after making sundry appropriations, including a provision in *section 2* authorizing the Public Printer to pay a person named, "to reimburse him for expenditures on the Index of the Congressional Record," then closes

iv. In the Simons' case it is said that in 1862 "it would have been unlawful for the owner [of lots] in Charleston to have paid taxes across the lines [between the Union and Confederate forces] and it would have been unlawful for the commissioners to have received them." (Act July 13, 1861—12 Stat. 257, sec. 5; Act May 20, 1862—*Id.*, 404). One object of the provision of the captured and abandoned property act for the restoration of property, and, perhaps, of other provisions, was to induce the adherents of the insurrection "to submit to the authority of the United States." (Haycraft's case, 22 Wall., 95.) On the facts of the Taylor case, (104 U. S., 219), which were different from those in the Simons' case, it was said "the owner could relieve his lands of the tax by paying it within sixty days after the commissioners had fixed its amount." The reasons on which the Simons' case rests are forcibly presented by the learned and able judge who delivered the opinion.

* The dangers arising from permanent appropriations, and the necessity of adhering to the construction given to permanent annual appropriations by the letter of the Secretary of the Treasury of April 20, 1877, is illustrated by the following extract from the Annual Report of the Fourth Auditor for the fiscal year ending June 30, 1884.

[The recently discovered frauds in the Bureau of Medicine and Surgery are now undergoing investigation in a court of justice, and I forbear making any remarks on the subject further than to call attention to the fact that a large balance in the continuous hospital fund, shown in this report to be nearly \$100,000, has furnished a temptation not existing in the case of annual appropriations made by Congress. This fund arises from the twenty cents a month deducted from the pay of each officer, seaman, and marine, and from fines imposed on them for any cause. The aggregate sum is variable, and is generally larger than is needed for any legitimate purpose. The correct method would be to cover these assessments and fines into the Treasury, and let the naval hospitals be sustained wholly by direct appropriations, as other parts of the service are. It is a question for Congress.]

said section with a provision having no connection with preceding matters, as follows:

[That the Secretary of the Treasury shall, at the commencement of each session of Congress, report the amount due each claimant whose claim has been allowed in whole or in part to the Speaker of the House of Representatives and the presiding officer of the Senate, who shall lay the same before their respective Houses for consideration. And hereafter all estimates of appropriations and estimates of deficiencies in appropriations intended for the consideration and seeking the action of any of the committees of Congress shall be transmitted to Congress through the Secretary of the Treasury, and in no other manner; and the said Secretary shall first cause the same to be properly classified, compiled, indexed, and printed, under the supervision of the chief of the division of warrants, estimates, and appropriations of his Department.]

The bill, which finally became said act of July 7, 1884 (23 Stat., 254), passed the House June 17th, was referred to the Senate Committee on Appropriations June 18th, and reported by Mr. Hale to the Senate June 27th, with a recommendation as to section 2 to "*omit the parts struck through and insert the parts printed in italics,*" as follows:

SEC. 2. [That the several accounting officers of the Treasury Department shall not receive, examine, and consider any claim against the United States unless it shall have been filed within one year from the passage of this act, or within five years after it shall have accrued, nor unless it shall have arisen under an obligation or liability of the United States incurred by authority of law, or under some appropriation originally applicable to the payment thereof, and the balance of which appropriation shall have been carried to the surplus fund; and any claim not filed within one of the periods above named shall be forever barred, except as hereinafter provided. If a person entitled to make a claim against the United States is at the time when it accrues or is matured an infant, or non compos mentis, or a married woman, or imprisoned on a criminal charge, or in execution upon conviction of a criminal offense for a term less than life, the time of such disability is not a part of the time herein limited for the filing of such claim, except that the time so limited cannot be extended more than five years by any such disability, except infancy, or in any case more than one year after the disability ceases. Nothing herein contained shall be held or construed to apply to a claim arising under the public debt of the United States; nor shall anything herein contained authorize the accounting officers or the Secretary of the Treasury to allow or reopen any claim which has already been disposed of by rejection or otherwise or which is already barred by any statute. And] *That the Secretary of the Treasury shall, at the commencement of each session of Congress, report the amount due each claimant whose claim has been allowed in whole or in part to the Speaker of the House of Representatives and the presiding officer of the Senate, who shall lay the same before their respective Houses for consideration. And hereafter all estimates of appropriations and estimates of deficiencies in appropriations intended for the consideration and seeking the action of any of the committees of Congress shall be transmitted to Congress through the Secretary of the Treasury, and in no other manner; and the said Secretary shall first cause the same to be properly classified, compiled, indexed, and printed, under the supervision of the chief of the division of warrants, estimates, and appropriations of his Department.*

It became a law in the form proposed in the Senate. It does not in terms, as did the act of June 14, 1878 (20 Stat., 130, sec. 4), require the accounting officers to "*continue* to receive, examine, and consider the justice and validity of all claims, the balances of which have been exhausted or carried to the surplus fund." It *recognizes* the jurisdiction of the accounting officers and thus in effect gives it. (Bliss' case, *ante*, 38.) It treats such provision as unnecessary; and this is true, since jurisdiction in all such cases is given to accounting officers by other provisions. (Rev. Stat., 268-275; *Id.*, 276-300; Five-Year Claims' case, 4 Lawrence, Compt. Dec., 252.) And not only so, but the jurisdiction to allow claims extends to all claims, whether any appropriation ever existed for their payment or not, except, of course, such claims as are barred by some special statute of limitations and such as are presumed by lapse of time to have been paid. (Baring Brothers & Co's case, 4 Lawrence, Compt. Dec., 8.) The provision of the act of July 7, 1884 (23 Stat., 254), requiring the Secretary of the Treasury "at the commencement of each session of Congress", to "report the amount due each claimant whose claim has been allowed", in its broad terms would literally require a report of all claims allowed, including even those which *had been paid*. But the statute says the claims reported are to be laid before the respective houses "*for consideration*." In view of the practice which previously prevailed, this means for consideration with a view to make or refuse appropriations for the payment of such claims—the claims, then, to be reported are not those which have been *paid*, but those allowed, whether an appropriation ever existed, or if so, has been exhausted or carried to the surplus fund. Claims created in violation of an appropriation act or other law, are of course not to be allowed; and it is made the duty of the *Secretary of the Treasury* to report *all* claims so allowed, so that the practice should not be revived, by which, prior to the act of June 14, 1878 (20 Stat., 130, sec. 4), and by force of the act of June 20, 1874 (18 Stat., 110), and of section 273 of the Revised Statutes, claims, for the payment of which no appropriation existed, were, when allowed by accounting officers, reported to the Secretary of the *Department in which the expenditure had been incurred* (Rev. Stat., 273), and the Secretary of the Treasury, at the beginning of each session of Congress, included in his "annual estimates" sums "needed to be reappropriated." (Five-Year Claims' case, 4 Lawrence, Compt. Dec., 253.) Under the act of July 7, 1884 (23 Stat., 274, sec. 2), the Secretary of the Treasury is required to report to Congress claims allowed by accounting officers for the payment of which no appropriation is available, and for which no estimate is included in the estimates sent to Congress for other general expenditures. The result is that the accounting officers will allow claims, lawfully due from the United States, without reference to the existence of an appropriation for their payment; and the claims so allowed, will, of course, be reported by the Secretary of the Treasury to Congress "for consideration."

The question now arises whether the sum, the refunding of which is asked, was unlawfully collected from the claimant? He made no such *voluntary payment* as bars any right. (*Swift Co. v. United States*, 11 U. S., 22; *Simons' case*, 19 Ct. Cl., 629.) The material facts on which to determine the question mentioned are:—"The commanding general of the forces of the United States * * * established the authority of the United States" (act June 7, 1862—12 Stat., 422, sec. 6), throughout the district of Beaufort, in South Carolina, prior to November 3, 1862, at which date the direct-tax commissioners by resolution "assessed upon the lands of the said State [of South Carolina and on printed lists of valuations made by the State authorities for 1860] the sum of two dollars *ad valorem* for each one hundred dollars valuation * * * and upon * * * city lots * * * eighty cents *ad valorem* * * *." The city of Charleston was then under Confederate control, and the military authority of the United States was established therein February 17, 1865. On March 6th, thereafter, the commissioners by resolution adopted "the valuation of the printed tax list of * * * Charleston for 1860 as the basis of valuations for assessing the lots of said city," and notices of readiness to receive the taxes for sixty days from said date on lots and lands in St. Phillips and St. Michaels parishes were, by order of the commissioners, posted at three public places in Charleston. November 21, 1865, the tax was paid as stated.

On April 1, 1865, the commissioners recommended that the sale of lands for the non-payment of direct taxes should be postponed to the following November. They were so postponed; but the sales did not occur.

The office of the commissioners in Charleston, South Carolina, was closed May 22, 1865. During the summer and autumn of 1865, the board of direct-tax commissioners for the State of South Carolina held meetings outside of the said State, to wit, in the cities of New York and Brooklyn, and during the summer of 1865 there was a suspension of the collection of these taxes in South Carolina.

No sales were made in Charleston for direct taxes.

The act of August 5, 1861 (12 Stat., 294), laid a direct tax on the States. The act of June 7, 1862 (12 Stat., 422, sec. 1), provides that, when in any State or Territory or "*in any portion*" thereof by reason of insurrection, the act of August 5, 1861, for collecting direct taxes * * * "cannot be peaceably executed, the said direct taxes, by said act apportioned among the several States and Territories, respectively, shall be apportioned and charged in each State and Territory, or part thereof, wherein the civil authority is thus obstructed, upon all the lands and lots of ground situate therein, respectively, except such as are exempt from taxation by the laws of said State or of the United States, as the said lands or lots of ground were enumerated and valued under the last assessment and valuation thereof made under the authority of said State or Territory previous to the first day of January, anno Domini 1861; and each and every parcel of the said lands, according to said

valuation, is hereby declared to be, by virtue of this act, charged with the payment of so much of the whole tax laid and apportioned by said act upon the State or Territory wherein the same is respectively situate, as shall bear the same direct proportion to the whole amount of the direct tax apportioned to said State or Territory as the value of said parcels of land shall respectively bear to the whole valuation of the real estate in said State or Territory according to the said assessment and valuation made under the authority of the same; and in addition thereto a penalty of 50 per cent. of said tax shall be charged thereon.

SEC. 2. That on or before the first day of July next, the President, by his proclamation, shall declare in what States and parts of States said insurrection exists, and thereupon the said several lots or parcels of land shall become charged respectively with their respective portions of said direct tax and the same, together with the penalty, shall be a lien thereon without any other or further proceeding whatever.

SEC. 3. That it shall be lawful for the owner or owners of said lots or parcels of lands, within sixty days after the tax commissioners herein named shall have fixed the amount, to pay the tax thus charged upon the same, respectively, into the Treasury of the United States, or to the commissioners herein appointed, and take a certificate thereof, by virtue whereof the said lands shall be discharged from said tax.

SEC. 6. That the said board of tax commissioners shall enter upon the discharge of the duties of their office whenever the commanding general of the forces of the United States, entering into any such insurrectionary State or district, shall have established the military authority of the United States throughout any parish or district or county of the same, and they shall open one or more offices for the transaction of business.

And section 7 of said act, as amended by the act of February 6, 1863, provides—

“That the said board of commissioners shall be required, in case the taxes charged upon the said lots and parcels of land shall not be paid, as provided for in the third section of this act, to cause the same to be advertised for sale in a newspaper published in the town, parish, district, or county where situate; and if there be no such newspaper published in said town, parish, district, or county, or if the publisher thereof refuse to publish the same, then in any other newspaper to be selected by said commissioners in said district, or in the city of Washington, for at least four weeks, and by posting notices of said sale in three public places in the town, parish, district, or county within which said lands are situate, at least four weeks previous to the day of sale; and at the time and place of sale to cause the same to be severally sold to the highest bidder for a sum not less than the taxes, penalty, and costs, and 10 per centum interest per annum on said tax, pursuant to said notice. In all cases where the owner of said lots or parcels of ground shall not, on or before the day of sale, appear in person before the said board of commissioners and pay the amount of said tax, with 10 per centum interest thereon, with the cost of advertising the same, or request the same to be struck off to a purchaser for a less sum than two-thirds of the assessed value of said several lots or parcels of ground, the said commissioners shall be authorized at said sale to bid off the same for the United States at a sum not exceeding two thirds of the assessed value thereof, unless some person shall bid a larger sum; and in that case the same shall be struck off to the highest bidder, who shall, upon

paying the purchase-money in gold and silver coin, or in the Treasury notes of the United States, or in United States notes, or in certificates of indebtedness against the United States, be entitled to receive from said commissioners their certificate of sale; which said certificate shall be received in all courts and places as *prima facie* evidence of the regularity and validity of said sale, and of the title of the said purchaser or purchasers under the same: *Provided*, That the owner of said lots of ground, or any loyal person of the United States having any valid lien upon or interest in the same, may, at any time within sixty days after said sale, appear before the said board of tax commissioners in his or her own proper person, and, if a citizen, upon taking an oath to support the Constitution of the United States, and paying the amount of said tax and penalty, with interest thereon from the date of the said proclamation of the President mentioned in the second section of this act, at the rate of 15 per centum per annum, together with the expenses of the sale and subsequent proceedings, to be determined by said commissioners, may redeem said lots of land from said sale."

Under these provisions various questions arise: Could the direct tax commissioners, with "one or more offices" in a *part* of a State in which the military authority of the United States was established (sec. 6, act of June 7, 1862), *fix* (sec. 3) the tax assessment for *another portion* not then subjected to such military authority?—(United States *v.* Taylor, 104 U. S., 220)—"in insurrectionary districts"? When did the "penalty of fifty *per centum* of said tax" (sec. 1) begin (sec. 2 and sec. 7—12 Stat., 640)? When did the ten *per centum* interest begin to run? (Bennett *v.* Hunter, 9 Wall., 326; secs. 3, 7, act June 7, 1862; United States *v.* Taylor, 104 U. S., 219.) If too much interest be exacted from the owner of a lot, and he be chargeable with a penalty not exacted, can the latter be set off against a claim for a refund of the former? If ten *per centum* be unlawfully collected, can the party paying it claim a refund without evidence that it has been *paid into the Treasury*? This latter question is now unimportant, as to South Carolina, since the commissioners' accounts for that State are settled, and it sufficiently appears that the money collected by them has been paid into the Treasury.

The questions so presented will not now be decided. They will be left to await a final decision in cases now pending in the Court of Claims, some of which may possibly reach the Supreme Court. This course is in accord with the views of the Acting Secretary of the Treasury.*

* This will appear from the following:

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
Washington, D. C., November 25, 1884.

HON. WALTER EVANS,
Commissioner of Internal Revenue:

SIR: With your letter of the 11th instant you transmitted the claim of John Fraser & Co., of Charleston, S. C., for the refunding of interest alleged to have been illegally charged and collected by the direct tax commissioners of South Carolina on lands described in the receipt marked "A" enclosed in your letter.

You state that the tax on said lands was "fixed" March 6, 1865, that it was paid

Under the act of February 25, 1867 (14 Stat., 568, sec. 5; Rev. Stat., 3689), the usage has been that claims of this character have been examined by the Commissioner of Internal Revenue, and by the Secretary of the Treasury, who approves or disapproves payment as he deems

with the interest November 25, 1865, that the lands were not advertised for sale, and that the interest as shown by said receipt marked "A," which, you state, "agrees with a record book of the direct tax commissioners on file in your office," amounted to \$2,747.63, and you recommend the allowance of this sum provided the Secretary adheres to the ruling set forth in the letter of Acting Secretary Coon on the 18th of September last in the Farrar case.

In that case the Acting Secretary accepted the decision of the Court of Claims in the Simons' case, in which it was found that the tax was "fixed" by the direct tax commissioners for South Carolina on March 6, 1865, and was paid May 6, 1865, and wherein the court held that the exaction of 10 per cent. interest in May, 1865, on a tax imposed upon real property in Charleston was money collected without warrant of law.

This was regarded as deciding in the negative one question which had been raised in the case, viz, whether interest could legally be charged "after" the expiration of the sixty days named in section 3 of the act of June 7, 1862 (12 Stat., 422). Aside from the fact that the court used the words "in May, 1865," it was considered that from March 6 to May 6 was more than sixty days, and, therefore, that the decision in the Simons' case was applicable to the Farrar case.

You now assert that "up to the 6th day of May, 1865, the sixty days next ensuing after the fixing of the tax had not expired, and the court might well find that up to that time in May interest was not chargeable," and you ask, "Did the court really intend to decide that *after* the sixty days no interest was chargeable."

To this I reply that, whatever the court intended, it is evident that from March 6 to the ending of May 6 there are *sixty-one natural days*; and as sixty days had fully expired at the close of May 5th, and the tax was paid on the 6th, (according to the *erroneous finding of the court, the receipt itself showing that it was paid on the 11th*), it follows that the tax was paid *after* the expiration of sixty days. And the court said that the exaction of interest on this tax was without warrant of law.

So far, therefore, as this point is concerned, it is considered that the pending case is covered by the decision of the Court of Claims in the *Simons' case*, equally with the Farrar case, and the refunding of the interest claimed might with equal propriety be approved.

But there is another point on which something may be said. When the letter of the 18th of September last was written, it was supposed that the Court of Claims had *fully considered*, in the *Simons' case*, the question whether interest was chargeable from July 1, 1862.

In a letter to the Secretary of the Treasury dated September 24, 1870, the First Comptroller, R. W. Tayler, held that the tax levied by the act of August 5, 1861, became due July 1, 1862,—the date of the President's proclamation issued by virtue of section 3 of the act of June 7, 1862,—and that interest was chargeable from the time the tax became due.

On a closer inspection of the Record, the Brief for the Government, and the opinion of the Court in the *Simons' case*, than was made when the letter of the 18th was written, it does not clearly appear that the point raised by Comptroller Tayler was *presented, argued, or considered*.

Even if, as the Court held, the Direct Tax Commissioners had no right to "fix" the tax in a certain place or territory until it had been occupied by the forces of the Government, yet the point raised by Comptroller Tayler may be entirely consistent with this ruling of the Court. And, therefore, it is now deemed best *not to allow any more claims of this kind under the opinion of the Simons' case*; but to await a further consideration and decision in some of the cases of the same class that are understood to be still pending before the court.

If another case should be tried and decided, it is desirable that the opinion of the Court shall clearly set forth, in case it should hold that interest did not begin to run from July 1, 1862, whether it did begin and should be computed either from the time the tax was "fixed," or from the expiration of the sixty days, in cases where the lands were not advertised for sale.

Very respectfully,

CHARLES E. COON,
Acting Secretary.

proper. The final decision in the Department, of course, rests with the First Comptroller. Tax-Sale Surplus case, *ante*, 59, 75.

No further action now will be taken in this case.*

TREASURY DEPARTMENT,

First Comptroller's Office, November 29, 1884.

* The Simons' case as printed under the direction of the Court of Claims in advance of the publication of the 19th volume of the Reports of the Court is as follows:—

COURT OF CLAIMS.

JOHN H. SIMONS }
v. } No. 14027.
THE UNITED STATES. }

FINDINGS OF FACT.—This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I. On the 3d November, 1862, at Beaufort, S. C., the tax commissioners for the collection of United States direct taxes in South Carolina adopted the following resolution:

Resolved, That inasmuch as the records of the last assessment and valuations of the lands and lots of ground made under the authority of the State of South Carolina, previous to the first day of January, A. D. 1861, are so concealed as not to come within the possession of the commissioners, therefore, upon the evidence taken, and which has come before us, the said commissioners, the said assessment and valuation of the whole real estate in said State we find to be, and do fix and establish the same at, the sum of thirty millions eight hundred and thirty-three thousand three hundred and twenty-two dollars ten cents and four mills (\$30,833,322.10 $\frac{4}{10}$).

Resolved further, That there be assessed upon the lands of the said State the sum of two dollars ad valorem for each one hundred dollars valuation, and that there be assessed upon the city, town, village, and borough lots the sum of eighty cents ad valorem on each one hundred dollars of valuation.

II. The above assessment and valuation was founded upon printed lists of valuations made by the State authorities for the year 1860.

III. The city of Charleston was occupied February 17, 1865, and on March 6 the commissioners "fixed the amount of the tax" by the following resolves:

1st. *Resolved*, That the valuations of the printed tax list of the city of Charleston for 1860 be adopted as the basis of valuations for assessing the lots of the said city, and that the farming, gardening, or planting lands of St. Phillip's and St. Michael's be assessed as by the State valuations.

2d. *Resolved*, That the house No. 26 Pitt street be taken for the present as the office of this commission.

It was also *Ordered*, That notices of readiness to receive the taxes of St. Phillip's and St. Michael's be put up at the gate of this office, under the porch of St. Michael's church, and at the post-office.

And the following notice was so posted:

TAX NOTICE.—The undersigned, U. S. direct-tax commissioners for South Carolina, having completed the assessment on lots and lands in St. Phillip's and St. Michael's parishes, S. C., are now prepared to receive the taxes on the same at their office, No. 26 Pitt street, Charleston, So. Ca., between the hours of 10 a. m. and 3 p. m. each day, Sundays excepted, for sixty days from this date.

Charleston, So. C., March 6th, 1865.

WM. HENRY BRISBANE.
W. F. WORDING.
D. N. COOLEY.

IV. During sixty days after the 3d November, 1862, no effort was made by claimant, either in person or by an agent, to pay to the commissioners or into the Treasury of the United States the direct taxes charged on lot No. 6, Lynch street, Charleston, S. C., valued at \$18,000, but on the 6th day of May, 1865, the money was paid to the commissioners by one William Lucas, and in addition thereto \$40.50, being interest

on the same at the rate of 10 per centum per annum from July 1, 1862, the date of the President's proclamation. Claimant subsequently ratified this act by refunding the money to Lucas. The money was paid to the tax commissioners without objection or protest, and before any effort had been made to sell the property. It was not until August 23, 1882, when claim was made for refund of the interest that claimant intimated in any way that payment of any part of the \$184.80 was involuntary or illegal.

V. The claim thus presented to the Secretary of the Treasury has by him been transmitted to this court, it being agreed by the claimant that the reference shall not be treated as any waiver of the statute of limitations.

VI. At the time when the claimant's tax was paid all unoccupied houses in Charleston, including that of the claimant, had been regarded as abandoned by the officers of the Government, and the owners thereof were not allowed to acquire possession until their direct taxes thereon were paid.

At the time of payment, as set forth in Finding IV, the commissioners indorsed on the receipt to claimant for this tax, as follows:

The direct taxes on within-named property having been paid, the owner or agent is hereby authorized to collect the rents.

VII. [On April 1, 1865, the commissioners recommended that the sale of lands for the non-payment of direct taxes should be postponed to the following November. They were so postponed, *but the sales did not occur.*

The office of the commissioners in Charleston, S. C., was closed May 22, 1865. During the summer and autumn of 1865, the board of direct-tax commissioners for the State of South Carolina held meetings outside of the said State, to wit, in the cities of New York and Brooklyn, and during the summer of 1865 *there was a suspension of the collection of these taxes in South Carolina.*

No sales were made in Charleston for direct taxes.]

CONCLUSIONS OF LAW.—And upon the foregoing findings of fact the court decides as conclusions of law:

The claimant is entitled to recover the interest charged him upon the direct tax, as set forth in Finding IV, to wit, \$40.80.

NORR, J., delivered the opinion of the court:

In 1862 the United States direct-tax commissioners for the State of South Carolina passed a resolution imposing a tax on all real property within the State. In 1865 they charged and received from the claimant interest on the tax for a period running from the President's proclamation of July 1, 1862, to the time of payment.

When the tax commissioners fixed the assessment of taxes in the State by their resolution of November 3, 1862, they were in Beaufort, on one side of the military lines, and the claimant was, it may be assumed, in Charleston, on the other. At that time the tax commissioners and the party taxed were enemies of each other, and all business intercourse between them was forbidden both by international and statute law. It would have been unlawful for the owner in Charleston to have paid taxes across the lines, and it would have been unlawful for the commissioners to have received them.

The Act 7th June, 1865 (12 Stat. L., p. 422, sec. 6, ch. 98), provided—

That the said board of tax commissioners shall enter upon the discharge of the duties of their office whenever the commanding general of the forces of the United States, entering into any such insurrectionary State or district, shall have established the military authority of the United States throughout any parish or district or county of the same.

The statute therein harmonized with the law which regulated commercial intercourse, and renders it manifest, we think, that the direct taxes could not have been fixed upon property in Charleston until the owners could have lawfully paid them and the commissioners lawfully received them. Charleston was occupied by the forces of the Government on the 17th February, 1865, and the commissioners again

"fixed the amount of the tax" on property in Charleston by their resolution of March 6. In the opinion of the court that was the first time that the amount of the tax was fixed within the true intent of the statute, the previous resolution of November 3d being operative certainly no further than the military lines extended. Hence, the penalty of 10 per cent. interest exacted of the claimant from July 1, 1862, was unauthorized by law.

The tax was paid without protest or objection, and the counsel for the Government contends that it was a voluntary payment made in mistake of law which cannot be recovered back.

It is conceded that as to personal property the payment of an illegal tax is not deemed voluntary though made without protest, but it is said that as to real property, where the owner can always bring his action of ejectment, the rule is different. Without stopping to inquire whether the rule generally is different, we are of the opinion that the principle applicable to cases like this is the same. Where a man is obliged to pay an illegal tax to obtain possession of his property, whether it be personal or whether it be real, the payment is involuntary.

This case indeed seems to the court analogous in every part to the proclamation cases *De Bow, &c.* (11 C. Cls. R., 672; affirmed 13 *id.*, 562), where this question of voluntary or involuntary payment was considered. There the officers of the Government had acquired possession of the claimant's property (his cotton) lawfully. In the belief that they had a statutory right to charge him a license fee for bringing it into New Orleans they required him to pay one, and he paid without objection, but to obtain possession of his property. Here the officers of the Government likewise had acquired possession of the claimant's property (his house) lawfully; and, in the belief that they had a right to charge him the 10 per cent. interest, they required him to pay it, and he paid without objection, but to obtain possession of his property. In the language of Baron Martin in *Steele v. Williams* (20 Eng. L. & Eq. R., 319), "to call such a payment a voluntary payment is an abuse of language."

This case was transmitted to the court by the Secretary of the Treasury upon condition, and accompanied by a stipulation on the part of the claimant to the effect that the statute of limitations be not waived by the transmission. We proceed, therefore, to inquire whether the case is barred by the statute.

The Act 7th June, 1862, under which this tax was levied, was "An act for the collection of *direct taxes* in insurrectionary districts within the United States." The Revised Statutes provide:

§ 3689. There are appropriated, out of any moneys in the Treasury not otherwise appropriated, for the purposes hereinafter specified, such sums as may be necessary for the same respectively; and such appropriations shall be deemed permanent annual appropriations.

To refund to persons money collected from them without warrant of law, as in payment of dues under the *direct-tax laws*.

And this court now decides that the exaction of 10 per cent. interest in May, 1865, on a tax imposed upon real property in Charleston was money collected 'without warrant of law.'

[The claim, therefore, is one for which the law provides a *permanent appropriation* and concerning which the Revised Statutes in effect declare the policy of the Government to be: That moneys collected by its agents under the direct-tax laws which are not really taxes, that is to say, which were "collected without warrant of law," shall always be refunded, and the refunding shall not be dependent upon annual appropriation acts. Thus far the policy of the Government is clear, and the intent of Congress unquestionable.]

The *Joint Resolution 25th February, 1867* (14 Stat. L., 568, sec. 4), more explicitly provided:

That the Secretary of the Treasury shall be authorized to refund to persons from whom money has been received without warrant of law, as in payment of dues under

the direct-tax laws, the sums so illegally collected; such refunding to be ordered on the presentation, in each case, of satisfactory evidence of the illegal collection.

It is not altogether clear that the application for a refund must first be made to the Secretary of the Treasury before suit can be brought. But it is clear, as was said by Mr. Justice Woods, in *Mrs. Irene Taylor's Case* (104 U. S. R., 216), of a section of another statute—

This section limits no time within which application must be made to the Treasury for the proceeds of the sale. The Secretary was not authorized to fix such a limit. Whenever the owner of the lands, or his legal representatives, should apply for the money, it was the duty of the Secretary to draw his warrant therefor, without regard to the period which had elapsed since the sale. The fact that six or any other number of years had passed did not authorize him to refuse payment. The person entitled to the money could allow it to remain in the Treasury for an indefinite period of time, without losing his right to demand and receive it. It follows that if he was not required to demand it within six years, he was not required to sue for it within that time.

And we may add, in the language of the same learned judge:

A construction consistent with good faith on the part of the United States should be given to these statutes. It would certainly not be fair dealing for the Government to say to the owner that the surplus proceeds should be held in the Treasury for an indefinite period for his use or that of his legal representatives, and then, upon suit brought to recover them, to plead in bar that the demand therefor had not been made within six years.

When Congress appropriate money generally, as for the annual expenses of the Government, no legislative intent can be inferred to renovate a claim or class of claims barred by the statute of limitations. But when Congress appropriate money for the payment of a designated claim or class of claims already barred by the statute of limitations it must be inferred that the legislative intent was to give a new promise founded upon the old consideration. In such cases the statute of limitations begins to run from the enactment of the appropriation act. So when Congress give legal efficacy to a designated claim or class of claims which were not legal rights or which were rights without a remedy it must be inferred that the newly created claims should accrue from the passage of the enabling act or from the happening of some event prescribed therein. The cases of *Hukill* (16 C. Cls. R., 562) and *Mrs. Taylor* (14 *id.*, 339) illustrate what is here meant. Now, in the direct-tax cases like the one at bar the claimants were without right or remedy till the joint resolution 1867 came to give them both. Manifestly, therefore, claims which were virtually created by the joint resolution did not accrue at the previous time when the money was collected without warrant of law.

When, then, did they accrue? The joint resolution named no time, but provided for the happening of an event, viz, *their presentation to the Secretary of the Treasury*, and upon the happening of that event each claim accrued. The joint resolution was merged in the Revised Statutes, but it cannot be said that the statute of limitation should then begin to run, for manifestly there was no intent to change the usage or impair the rights of parties. We must therefore fall back upon the words of the Supreme Court concerning a surplus in the Treasury derived from tax sales and say:

The person entitled to the money could allow it to remain in the Treasury for an indefinite period without losing his right to demand and receive it. It follows that if he was not required to demand it within six years he was not required to sue for it within that time.

The judgment of the court is that the claimant recover of the defendants the sum of \$40.80.

IN THE MATTER OF THE AUTHORITY OF A COMMISSIONER OF A CIRCUIT COURT TO APPOINT A SPECIAL DEPUTY MARSHAL, OR PRIVATE PERSON, TO SERVE A WARRANT OF ARREST, OR OTHER CRIMINAL PROCESS.—ARREST CASE.

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1. The "*Special Deputy Marshal's case*" (4 Lawrence, Compt. Dec., 473), reaffirmed and explained.
 2. A commissioner of a circuit court of the United States has, as a general rule, no authority to appoint a special deputy marshal or other person to serve a warrant of arrest or other criminal process. An exception to this general rule exists in the cases prescribed in section 1984 of the Revised Statutes.
 3. In some cases private persons may without warrant arrest persons guilty of felony.
 4. Private persons cannot be paid by the Government for making arrests, unless provision be made by statute to authorize payment.

The question is presented to the First Comptroller to decide whether a commissioner of a circuit court of the United States can appoint a special deputy marshal, or any person, to serve a warrant of arrest, or other criminal process.

DECISION BY WILLIAM LAWRENCE, *First Comptroller*.

The question presented in this case was decided in *Special Deputy Marshal's case* (4 Lawrence, Compt. Dec., 473), in which it was held that "there is no statute which by any language fairly construed, much less in clear terms, gives authority to a commissioner [of a circuit court] to appoint a deputy marshal or person to serve a warrant of arrest." This was said, of course, as applicable to the *facts of that case*. That case is now reaffirmed. It may be proper to say that under Title XXIV of the Revised Statutes containing provisions relating to civil rights, and affixing penalties for their violation, provision is made as follows:

SEC. 1982. The district attorneys, marshals, and deputy marshals, the commissioners appointed by the circuit and territorial courts, with power to arrest, imprison, or bail offenders, and every other officer who is especially empowered by the President, are authorized and required, at the expense of the United States, to institute prosecutions against all persons violating any of the provisions of chapter seven of the Title "CRIMES," and to cause such persons to be arrested, and imprisoned or bailed, for trial before the court of the United States or the territorial court having cognizance of the offense.

SEC. 1983. The circuit courts of the United States and the district courts of the Territories, from time to time, shall increase the number of commissioners, so as to afford a speedy and convenient means for the arrest and examination of persons charged with the crimes referred to in the preceding section; and such commissioners are authorized and required to exercise all the powers and duties conferred on them herein

with regard to such offenses in like manner as they are authorized by law to exercise with regard to other offenses against the laws of the United States.

SEC. 1984. The commissioners authorized to be appointed by the preceding section are empowered, within their respective counties, to appoint, in writing, under their hands, one or more suitable persons, from time to time, who shall execute all such warrants or other process as the commissioners may issue in the lawful performance of their duties, and the persons so appointed shall have authority to summon and call to their aid the bystanders or posse comitatus of the proper county, or such portion of the land or naval forces of the United States, or of the militia, as may be necessary to the performance of the duty with which they are charged; and such warrants shall run and be executed anywhere in the State or Territory within which they are issued. [See § 5516.]

This latter section gives authority to commissioners "to appoint in writing one or more persons from time to time who shall execute all such warrants or other process as the commissioners [respectively] may issue in the lawful performance of their [respective] duties." The decision in the *Special Deputy Marshal's case* (4 Lawrence, Compt. Dec., 473) had no reference to appointments made under said last-named section. With this exception a commissioner has no authority to appoint a deputy marshal or other person to serve a warrant of arrest or other criminal process. There are cases, however, in which such process may be lawfully served by private persons, or rather in which they may, and in which it is their duty to make arrests without warrant, of persons guilty of felony. (Army Officer's case, *ante*, 416; Bouvier, Dic., Title, Arrest; 1 Bishop, Criminal Procedure, 164-172, citing numerous cases; Law of Arrests, 200; 1 Chitty, Crim. Law, 16, 716.) On general principles, no compensation can be paid by the Government, to private persons, for making arrests, unless provision be made by statute to authorize it. This case is disposed of in accordance with the principles stated.

TREASURY DEPARTMENT,

First Comptroller's Office, December 3, 1884.

IN THE MATTER OF THE RIGHT OF A DISTRICT ATTORNEY OF THE UNITED STATES TO A PER DIEM FEE FOR "EXAMINATION OF PERSONS CHARGED WITH CRIME" BEFORE A COMMISSIONER OF THE CIRCUIT COURT, ON A DAY WHEN THERE IS NO HEARING OR DECIDING OF SUCH CHARGE, BY A COMMISSIONER, BUT ONLY AN ADJOURNMENT TO A SUBSEQUENT DAY.—HYDE'S CASE.

1. Construction given to sections 823, 824 and 847 of the Revised Statutes.
2. When a commissioner of a circuit court, before whom a criminal charge is pending, adjourns its hearing over from one day to a later day, and nothing further is done, there can, in such case, be no "examination by a district attorney before a commissioner of persons charged with crime."
3. In such case, the district attorney is not entitled to the *per diem* fee of five dollars prescribed by section 824 of the Revised Statutes for an examination of persons charged with crime.
4. Rule for construing salary and fee statutes referred to.

The statute provides that United States district attorneys shall be entitled "to the following and no other compensation:

For *examination* by a district attorney, before a judge or commissioner, of persons charged with crime, five dollars a day for the time necessarily employed." (Rev. Stat., 823, 824.)

Wesley W. Hyde, as assistant to the United States Attorney for the western district of Michigan, appeared for the Government before a commissioner of the circuit court, August 9 and 30 and September 15, 1884, for the purpose of an examination of "persons charged with crime," but there was no "*hearing*" or "*deciding*" on any criminal charge. The hearing was on each day named simply adjourned over to a later day. The First Comptroller is required to decide whether a *per diem* fee can be allowed for service of the attorney on the several days named.

DECISION BY WILLIAM LAWRENCE, *First Comptroller*.

A commissioner is entitled to a *per diem* "for *hearing* and *deciding* on criminal charges." (Rev. Stat., 847.) (He is not entitled to a *per diem* fee, when there is no hearing, but only a *continuance* of the hearing, to a subsequent day. (Commissioner's Per Diem case, 3 Lawrence, Compt. Dec., 268; White's case, 4 Lawrence, Compt. Dec., 470.) The word "*examination*" (Rev. Stat., 824), as applied to the duty required of a district attorney, relates to a service rendered by him when the commissioner renders the service of "*hearing* and *deciding* on criminal charges." When the hearing by a commissioner of a charge is adjourned over from one day to a later day, then there can be no "*examination*" on the former of such days by the district attorney "of persons charged with

crime." An "adjournment" is not an "examination," nor does it afford any opportunity for any. The rules of construction, applicable to statutes giving salary, compensation and fees, have been elsewhere considered. (Meigs' case, 4 Lawrence, Compt., Dec., 621, 628; Crier-Bailiff case, *ante*, 244.) No *per diem* fee can be allowed for any service rendered on either of the days of the adjournments mentioned.

TREASURY DEPARTMENT,

First Comptroller's Office, December 3, 1884.



IN THE MATTER OF THE RIGHT OF A COLLECTOR OF INTERNAL REVENUE, TO SALARY WHILE ACTING AS SUCH, UNDER AN APPOINTMENT BY THE PRESIDENT, A CONFIRMATION BY THE SENATE, AND A COMMISSION IN PURSUANCE THEREOF, BUT BEFORE TAKING THE OATH OF OFFICE.—BURDETTE'S CASE.

June 25, 1883, during a recess of the Senate, the President appointed and commissioned B. collector of internal revenue, who executed bond, took the oath of office, and entered on duty July 25. March 5, 1884, the Senate confirmed the nomination of said B. previously sent in, he was commissioned March 7, executed bond March 15, it was filed in the office of the Solicitor of the Treasury then vacant March 31st, a solicitor was qualified July 3, who then entered on duty and approved said bond August 1st, on which day B. took the oath of office. Meantime he continued to act as collector from the time he first entered on duty. The question arose whether he was entitled to salary from July 7th to August 1, 1884.

Held:

1. The official authority of the collector under his first commission and bond, and the liability of his sureties, ceased as to money received or acts performed after July 7, 1884.
2. Under the commission of March 7, 1884, B. had no legal title to the office of collector, and no right to salary until he took the oath of office August 1, 1884.
3. He was a *de facto* officer from July 7 to August 1, 1884.
4. A vacancy in the office of solicitor, or a delay for an unreasonable time to approve a sufficient bond duly filed, cannot deprive a person commissioned and sworn from entering on the duties of the office, in which event he is vested with the legal title thereto, and the right to its salary.
5. The *directory* character of statutes requiring official bonds to be executed in a prescribed form, or within a specified time, considered.
6. The doctrine of *relation* considered, with reference to the approval of an official bond after the time required by statute.
7. The case of *State ex rel. f.c. v. Tool* (4 Ohio St., 533) examined.
8. The principle as to the *directory* character of a statute, as stated in *Brandt on Suretyship*, sec. 442, discussed.

The Revised Statutes, as amended by act of March 1, 1879 (20 Stat. 327, Sec. 2), contain the following sections:

SEC. 3142. The President, by and with the advice and consent of the Senate, shall appoint for each collection-district a collector, who shall be a resident of the same. * * *

SEC. 3143. Every collector, *before entering upon the duties of his office*,

shall *execute a bond* for such amount as may be prescribed by the Commissioner of Internal Revenue, under the direction of the Secretary of the Treasury, with not less than five sureties, *to be approved by the Solicitor of the Treasury*, conditioned that said collector shall faithfully perform the duties of his office according to law, and shall justly and faithfully account for and pay over to the United States, in compliance with the order or regulations of the Secretary of the Treasury, all public moneys which may come into his hands or possession; and he shall, from time to time, renew, strengthen, and increase his official bond, as the Secretary of the Treasury may direct, with such further conditions as the said Commissioner shall prescribe; and he shall execute a new bond whenever required so to do by the Secretary of the Treasury, with such conditions as may be required by law or prescribed by the Commissioner of Internal Revenue, with not less than five sureties; which new bond shall be in lieu of any former bond or bonds of such collector in respect to all liabilities accruing after the date of its approval by the Solicitor of the Treasury. Said bonds shall be filed in the office of the First Comptroller of the Treasury.

SEC. 3144. It shall be the duty of collectors of internal revenue to act as disbursing agents of the Treasury for the payment of all expenses of collection of taxes and other expenditures for the internal-revenue service within their respective districts, under regulations and instructions from the Secretary of the Treasury, on giving good and sufficient bond, with such sureties, in such form, and in such penal sum, as shall be prescribed by the First Comptroller of the Treasury, and approved by the Secretary of the Treasury, for the faithful performance of their duties as such disbursing agents, but no additional compensation shall be paid to collectors for such services.

SEC. 1769. The President is authorized to fill all vacancies which may happen *during the recess of the Senate* by reason of death or resignation or expiration of term of office *by granting commissions which shall expire at the end of their next session thereafter*. And if no appointment, by and with the advice and consent of the Senate, is made to an office so vacant or temporarily filled during such next session of the Senate, the office shall remain in abeyance, without any salary, fees, or emoluments attached thereto, until it is filled by appointment thereto by and with the advice and consent of the Senate; and during such time all the powers and duties belonging to such office shall be exercised by such other officer as may by law exercise such powers and duties in case of a vacancy in such office.

June 25, 1883, "during a recess of the Senate," the President appointed John W. Burdette collector of internal revenue for the fourth district of Iowa and issued to him a commission accordingly. July 25, 1883, he executed a bond with sureties as required by law, approved by the Solicitor of the Treasury August 20, 1883, and took the oath of office and entered on duty on the same date. December 3d, 1883, Congress assembled, the President nominated Burdette for collector, and on March 5th, 1884, the Senate confirmed the appointment. The Senate adjourned July 7, 1884. The duties of said collector were performed under the bond mentioned to July 7, 1884. (Rev. Stat., 1769; *United States v. McCartney et al.*, 26 Int. Rev. Record, 28, U. S. Circuit Court Mass.; *Gausson v. United States*, 97 U. S., 584; *United States v. Singer*, 15

Wall., 111; *United States v. Kirkpatrick*, 9 Wheat., 720, 734; *Com. v. Holmes*, 25 Gratt., 771; *Rees v. Berrington*, 2 Lead. Cas. Eq., 4 Am. ed., 1913.) March 7, 1884, Burdette was commissioned under the Senate confirmation. March 15, 1884, he executed a bond with sureties as required by law. March 31, 1884, the bond was filed in the office of the Solicitor of the Treasury for approval, but the office of Solicitor was then vacant, and so remained until July 3, 1884, when Hon. H. S. Neal was qualified and entered on duty as such. August 1, 1884, the bond of said Burdette was approved by the Solicitor. On the same day the collector took the oath of office, and entered on duty under said bond. He continued to perform the duties of collector from July 7, 1884, to August 1, 1884.

The question is presented to the First Comptroller to decide whether said Burdette is entitled to payment of salary during the period last named.

DECISION BY WILLIAM LAWRENCE, *First Comptroller*.

The official authority of the claimant under his first commission, oath and bond, and the liability of his sureties, ceased as to money received or acts performed, after the Senate adjourned July 7, 1884. (Rev. Stat., 1769; *United States v. Kirkpatrick*, 9 Wheat., 720, 734.)

The claimant had no legal right to exercise the duties of his office, by virtue of his commission issued March 7, 1884, under the confirmation of his appointment by the Senate, *until he took the oath of office August 1, 1884*. (Substitute case, 3 Lawrence, Compt. Dec., 346; Dunn's case, 4 Lawrence, Compt. Dec., 410; Schroeder's case, *ante*, 374.)

The oath of office, which was taken by the claimant under his *first* appointment, had no force or obligation under his *last* appointment. Thus in a similar case, the Supreme Court said, "the two commissions can not be considered *as one continuing appointment* * *. The first is limited in its duration to a specified period; the second is unlimited in duration, and during the pleasure of the President." (*United States v. Kirkpatrick*, 9 Wheat., 734.)

The claimant was a *de facto* officer from July 7, to August 1, 1884, but it is well settled that such officer is not generally entitled to the payment of salary from the United States unless by force of express statute in exceptional cases. (Evans' case, 3 Lawrence, Compt. Dec., 117, and cases above cited.) This being the general rule, it devolves on *de facto* officers, who demand compensation, to show that some statute has *clearly* made an exception in their favor. Exceptions can not arise from ambiguous language in a statute. (Claims-Assignment case, 3 Lawrence, Compt. Dec., 29; Osage Land case, *Id.*, 368.)

It is urged that such exception exists in this case, upon the authority of *United States v. Flanders and others*, decided by the Supreme Court November 3, 1884 (112 U. S. page —).

The material facts necessary to a correct understanding of that case are these:

March 4, 1863, George A. Denison was commissioned, under the act of July 1, 1862 (12 Stat. 433), as a collector of internal revenue; March 11, he entered on duty as such, and continued so to act until December 11, 1863; May 15, he took the oath of office and executed his bond as collector. The question presented for decision was, whether he was entitled to compensation from March 11, when he entered on duty, or only from May 15, when he took the oath of office and gave bond. Material provisions of statutes in force in 1863 and in 1884 are as follows:

Statutes in force in 1863.

"The President is authorized * * * to nominate, and by and with the advice and consent of the Senate to appoint * * * a collector [of internal revenue] for each [collection district]." (Act July 1, 1862, 12 Stat., 434, sec. 2.)

That before any such collector shall enter upon the duties of his office he shall execute a bond * * * with sureties. * * *. (*Id.*, Sec. 4.)

There shall be allowed to the collectors appointed under this act in full compensation for their services and that of their deputies in carrying this act into effect, a commission of four per centum * * * "to be computed upon the amounts by them [collectors appointed] respectively *paid over and accounted for.*" (*Id.*, Sec. 34.)

Statutes in force in 1884.

"The President by and with the advice and consent of the Senate shall appoint for each collection district a collector." (Rev. Stat., 3142, taken from Act July 1, 1862, 12 Stat., 433, Sec. 2.)

Every collector before entering upon the duties of his office, shall execute a bond * * * with sureties. (Rev. Stat., 3143, taken from act June 30, 1864, 13 Stat., 225, Sec. 9, as amended by Act March 1, 1879, 20 Stat., 327, Sec. 2.)

Allowances shall * * * be made in like manner [by the Secretary of the Treasury upon the recommendation of the Commissioner of Internal Revenue] for salary and office expenses of *collectors*, all of which shall be in lieu of the salary and commissions heretofore provided by law: Provided, however, that the *salaries of collectors* shall be fixed at \$2,000 per annum, where the annual collections amount to \$25,000, or less, and graduated up to the maximum limit of four thousand five hundred dollars; which latter sum shall be allowed in all cases where the collections amount to one million of dollars or upward. (Rev. Stat., 3145, as amended by act March 1, 1879, 20 Stat., 329, Sec. 2.)

Every person appointed to any office * * * shall before entering upon the duties of such office, and before being entitled to any of the salary or other emoluments thereof take and subscribe the following oath or affirmation [the form of which is given].

Any person * * * appointed to any office * * * shall before entering upon the duties of his office take and subscribe * * * the following oath [the form of which is given]. (Rev. Stat., 1756; act May 13, 1884, 23 Stat., 22 Sec. 2; Schroeder's case, *ante*, 377.)

It was in view of the facts stated, and the statutes cited that the Supreme Court, in the case referred to, said:

The compensation to which Denison was entitled was at the rate of \$10,000 a year, under section 34 of the Act of July 1st, 1862, (12 St., 445). That section allows the compensation to the collector "*appointed*," in full compensation for his services and those of his deputies. The compensation is by a specified percentage commission, to be computed on the moneys "paid over and accounted for under the instructions of the Treasury Department," the commissions not to exceed \$10,000 a year, in any case. The compensation is *given by the statute* to the collector, *when appointed*, and is based wholly on the amount of moneys paid over and accounted for. If he is *appointed*, and acts, and collects the moneys, and pays them over and accounts for them, *and the Government accepts his services* and receives the moneys, his title to the compensation necessarily accrues, unless there is a restriction growing out of the fact that another statute says that he must take the oath "before being entitled to any of the salary or other emoluments" of the office. But, we are of opinion that the statute is satisfied by holding that his title to receive, or retain, or hold, or appropriate, the commissions as compensation, does not arise until he takes and subscribes the oath or affirmation, but that, when he does so, his compensation is to be computed on moneys collected by him, *from the time when, under his appointment, he began to perform services as collector, which the Government accepted, provided he has paid over and accounted for such moneys.**

This seems to place the right of the collector on two concurrent and co-operating grounds, *first* and chiefly, that the *statute gives the compensation* "to the collector *when appointed*," and second, that "the Government accepts his services and receives the moneys he collects. This, of course, holds that a statute can, by express provision, give a right to compensation in such case, and that the proper construction of the act of July 1, 1862, is, that it gives a right to compensation on the facts stated. The right to the compensation seems to the rest especially on the force of the word "*appointed*" as used in the statute. It does not appear that without the force of this word compensation could have been recovered *merely* on the ground that the Government accepted the services of the *de facto* officer.†

* The words italicized are not so in the original, but are made so above to emphasize the ground upon which the decision is understood to have been placed.

† The forcible argument of the Hon. Wm. A. Maury, Assistant Attorney-General, on this point was as follows:

But who has the right to exercise a dispensing power over the law requiring the oath and the bond? It seems to be a doctrine fraught with great danger to the Treas-

In the case of Burdette, now under consideration, it may be said, the Government accepted his services and received the money he collected. So far *one* ground for demanding compensation is supplied. But the other ground is wanting—that of an express statute giving a collector “when appointed” a right to compensation. In the case of Denison, the compensation was merely “a specified percentage commission to be computed on the moneys ‘paid over and accounted for.’” (12 Stat., 433, Sec. 34.) The peculiar form of expression used by the statute gives to *collectors appointed a commission on moneys* collected, “paid over and accounted for.” This is compensation for services actually rendered. It is not a *fixed salary* to be paid whether services are rendered or not. The statute applicable in the case now under consideration makes no provision in favor of collectors who are merely *appointed*, and who *pay over and account for moneys* collected. On the contrary, it gives an absolute fixed minimum salary to “*collectors*” and authorizes “*allowances*” within a maximum limit of \$4,000, “for salary * * * of *collectors*.” This form of expression, by every fair construction, refers to *de jure* collectors—to those having a right to salary under the statutes, and who are by compliance with their provisions invested with a *legal title* to office, for without this there cannot be in law a “collector.” The acceptance of a commission, the official oath, and bond, are all requisite to complete the title to the office. The necessity for an official oath was by the founders of the Government deemed so essential that it is expressly required by a mandatory provision of the Constitution. (Art. 6, cl. 3.) Its language is—“all executive * * * officers * * * shall be bound by oath or affirmation.” Where affirmative words in a constitution or

any that any member of the Executive Department can bind the Government to compensate an officer for services performed before having been legally inducted into office. It would seem to be nothing more nor less than placing a premium on delay in qualifying according to law, and, in that way, subjecting the public money to risks which were not within the contemplation of Congress. In the eye of the law Denison was not collector prior to the 15th May, 1863.

A somewhat similar question was considered in *Exigency* case, (3 Lawrence, Compt. Dec., 106, 107.) “A municipal corporation as against persons who have dealt with it in good faith, and parted with value for its benefit cannot set up mere irregularities in the exercise of the powers conferred” to escape liability. It is “estopped to set up as a defense its own irregularities in the exercise of a power clearly granted to it.” (2 Dillon, *Municipal Corp.*, 936; *Marsh v. Fulton County*, 10 Wall., 676; *Hitchcock v. Galveston*, 96 U. S., 341; *Chapman v. County of Douglas*, 107 U. S., 348; *Morville v. American Tract Society*, 123 Mass., 129; *Pimental v. city of San Francisco*, 21 Cal., 363; *Argenti v. San Francisco*, 16 Cal., 282; *Clark v. Saline County*, 9 Nebraska, 516; *Thomas v. City of Richmond*, 12 Wall., 349; *Campbell v. The District*, 2 Mac Arthur, Sup. Ct. Dec., 533. These cases show that where work done was *authorized by law*, and has been accepted by a municipal corporation for the benefit of the public, the contractor may recover either upon his contract, or upon a *quantum meruit* or *quantum valebant*, although the agents of the corporation neglected their duty in not complying with the forms required by law. But these authorities, even if applicable to the Government, do not hold it liable as upon a *quantum meruit* or otherwise, for the services of a *de facto* officer performed without authority of law, and without any authorized ratification thereof.

statute are peremptory, they are mandatory. (Bishop, Written Laws, 256; Dwarris, 2d ed., 610.) The cases in which a constitutional provision may be regarded as directory must be rare. (Bishop, Written Laws, 36 a, 37, 256; *Washington v. Page*, 4 Cal., 388; *Smith, Stat. & Const. Law*, 670, 681; Dwarris, 2d ed., 608, 612; *Stayton v. Hulings*, 7 Indiana, 144; *Webster v. French*, 12 Ill., 302.) To treat a constitutional provision as directory is practical nullification, fraught with perils, and dangerous in the extreme. A statute cannot convert a mandatory provision of a constitution into a directory one, nor give a *de facto* officer a right which the constitution denies to him, or only gives to a *de jure* officer. A person commissioned but not sworn into office is not *de jure* an officer; he has not complied with the constitutional obligation to take an oath of office. To give him all the advantages of an office is very different from giving to the public the benefit of his acts as official, and has the practical effect of investing a person who is not an officer with all the attributes of an officer. It is perhaps, too late to say that, on constitutional grounds, this cannot be done by force of an express statute, but it is safe to say, a statute, the effect of which is to practically nullify a mandatory provision of the constitution, should be construed with great strictness, and should not be extended beyond the clearest force of its terms. It is a salutary and necessary general rule that a mandatory provision of the Constitution cannot in any form be evaded. "Statutes are not to be evaded any more than they are to be disobeyed." (Sedgwick Stat., 74; *Hannay v. Eve*, 3 Crauch, 242; *Humphrey v. Chamberlain*, 1 Kernan, 274; 4 Coke, 24 b; *Caldwell v. The Mayor, &c.*, 9 Paige, 575; *Broom, Legal Max.*, 732; *Jones v. Waite*, 5 Bing., N. C., 675; *Armstrong v. Armstrong*, 3 My & K., 64; *The Reward*, 2 Dods. Adm. R., 271; *Monroe v. Collins*, 17 Ohio St. R., 665; *Walker v. Cincinnati*, 21 Ohio St. R., 14; *Eichenlaub v. State*, 36 Ohio St., 140; *Taylor v. Commissioners*, 23 Ohio St., 22; *State v. Hipp*, Sup. Ct. Ohio, June, 1882; *Eveleth's case*, Second, 6 Lawrence, Compt. Dec. *Hardcastle*, Statutory Law, 24; *New Hampshire v. Louisiana*, 108 U. S., 76. The oath of office, so distinctly and imperatively required by the Constitution, is almost universally regarded, as a means essential to secure official fidelity, as much so as an oath to secure truthful testimony in courts of justice. It is hallowed by the general sentiment which has prevailed in its favor through centuries. This sentiment has "stood the test of human scrutiny, of talents and of time." The constitutional and statutory provisions requiring an oath of office are clearly mandatory. For the same reasons the statutory provision requiring an official bond is mandatory. Its object is to protect the Government from loss, not only by the liability it imposes on sureties, but by their vigilance in looking after the official conduct of the officer, and by his wholesome dread of this supervision, as well as sense of justice of saving his sureties from loss. Neither the oath of office, nor the official bond, can be safely dispensed with. On grounds of public policy, safety and justice, it should

require clear language in a statute to enable a person merely commissioned as an officer, to reap *all* its advantages, and yet escape the sacred obligation of an oath, escape the legal penalties, if any, for its violation, and withhold from the government and the people whom it represents the security of an official bond. It should require clear language in a statute to enable officers of the Government to accept as official services, and to reward with salary, those which are rendered by an *intruder* in office, liable at all times to judicial ouster as one acting without legal right, title or authority. To give an unauthorized and illegal acceptance of such unauthorized and illegal services, *all* the legal effect of vesting a title to office is practically to give the *appointing power* in a mode unknown to the Constitution, alien to its purposes, hostile to its objects, and without the guaranties it imperatively requires. If the oath of office and bond may be dispensed with, why may not also the consent of the Senate to an appointment? A person commissioned to office, but who does not perfect his title thereto by an oath of office and the tender of a sufficient bond, is not an officer—he is an *intruder*, who is bidding defiance to the law. To make the *violation of law*, by such intruder, and by officers who accept his services in violation of law and public policy, the *basis of a right* to compensation therefor, is to reverse legal maxims hoary with age and sanctified by the approval of the great doctors of the common law—that matchless system which has guided and guarded the progress of civilization, and the advance of learning and science, wherever the English speaking people exercise the power of government. (*Morville v. American Tract Society*, 123 Mass., 129; *Thomas v. City of Richmond*, 12 Wall., 349.) No statute exists, no rule of construction is now perceived, which makes the case an exception to the general principles of law which have been stated, or requires them now to be disregarded.

The general principles above stated are well settled at common law and by force of statutes. There may be, and are, special provisions of statutes, and exceptional reasons, which in some cases change the principles stated, but they have no application to this case.

This case is only important now, as it affords the occasion for stating that the claimant could have established a right to salary, if, after filing his bond with the Solicitor of the Treasury, he had taken the oath of office, when a reasonable time had elapsed to enable the Solicitor to approve it. The claimant's appointment was advised and consented to, by the Senate March 5, 1884, he was commissioned March 15th, he filed a sufficient and proper bond in the office of the Solicitor of the Treasury March 31st, and thus *did all the law required him to do*, to enter on the duties of the office, *except to take the oath of office* under his new commission. If he had taken the oath of office on the 8th of July he would then have done all that the law required of him. The law required the bond to be approved by the Solicitor of the Treasury, but a failure or unreasonable delay on his part to do so, or a vacancy in the office of

solicitor rendering it impossible to procure the proper approval, could not deprive the claimant of the right to take the oath of office, and enter on his duties. A collector duly appointed to office, cannot be deprived of his title thereto, by a vacancy in the office of Solicitor. When a Solicitor is in office, he is entitled to a reasonable time, after a bond is filed with him, or perhaps to a reasonable time after the confirmation of an appointment by the Senate and the issue of a commission, to ascertain the sufficiency of the sureties thereon. But the officer so commissioned, cannot be indefinitely deprived of his title to office, with his right to salary, by a delay in the approval of a sufficient bond, nor by a vacancy in the office which is required to approve his bond. The vacancy is no fault of the officer tendering the bond for approval. He is not required to procure an approval, when this is impossible. *Lex non cogit ad impossibilia.* (Broom, Legal Max., 242.)

Of course the claimant was required to present a sufficient bond, in order to entitle him to take the title to his office, and give him a right to the salary thereof. The subsequent approval of the bond by the Solicitor, is evidence that this was done. It is true, a surety might have been insufficient when he signed the bond, and might have become sufficient afterwards and before its approval, but in the absence of evidence to that effect, it is to be presumed, that sureties deemed sufficient at the date of approval were so at the time of execution. (2 Wharton, Ev., 1284-1296; 1 Greenl., Ev., 41.)

The principle that the neglect of an officer for an unreasonable time to approve a sufficient bond, can not deprive the person giving it of his title to an office is well supported by authorities. Thus in *State (ex rel. Attorney General) v. Tool* (4 Ohio St., 553) it appeared that at the October election of 1854 Tool was duly elected treasurer of Hocking County, Ohio; on the first Monday of June thereafter he executed a proper official bond, and then filed it with the county commissioners, and took the oath of office; the commissioners on that day neither accepted nor rejected the bond, but on the next day approved it. The statute required the treasurer "previous to entering on the duties of his office" to "give bond with four or more freehold securities to the acceptance of the county commissioners," and to take the oath of office. The statute also provided that "if any person elected shall not give bond and take the oath * * * on or before the first Monday in June, * * * his office shall be vacant." On *quo warranto* the question arose as to the right of Tool to hold the office. The court said:

"The bond was executed and delivered to the commissioners for their acceptance, within the time prescribed by law, but was neither accepted nor rejected on that day; but on the next day and during the regular June session of the commissioners, was accepted and approved by them. Now, if a good and sufficient bond, executed according to law, with the oath of the treasurer executed thereon as prescribed by the statute, had been presented to the commissioners at the March term, 1855, and they had not acted on the bond until the day after the first Monday of June,

1855, and then approved the same, it could scarcely be contended that the treasurer would be deprived of his office. The treasurer, in such case, would have *done all that the law required of him to do*; and it would, to say the least of it, be strange if, by the neglect of the commissioners, he was not only deprived of his office, but the commissioners themselves thereby acquired the power of appointing another in his place.

"In such case, the doctrine of *relation* would apply, and the acceptance, by the commissioners, of the bond on the next day, would *relate back* to the time of the delivery of the bond to the commissioners for their acceptance.

"It is said in Viner's Abridgment, vol. 18, page 290, that where there are divers acts concurrent to make a conveyance, estate, or other thing, the original act shall be preferred, and to this the other acts shall *have relation*.

* * * * *

"The presentation of the bond on the first Monday of June, with the oath indorsed thereon and the acceptance by the commissioners, are, in the sense in which the word concurrent is used by Viner, concurrent acts, and the acceptances shall relate back to the first Monday of June, and the whole be considered as having been done on that day; although, in point of fact, the acceptance was made and entered by the commissioners on the day after the first Monday of June."

The proceeding on *quo warranto* was accordingly dismissed.

It has been held in many cases that private parties cannot be deprived of their rights arising under contract, and otherwise, by reason of a failure of officers to perform duties required of them by law. (Exporter's case, *ante*, 25; Printer's case, 2 Lawrence, Compt. Dec., 504.) When a person duly commissioned to office gives a sufficient bond in due time, takes the oath of office, and performs the duties thereof, it is obligatory on the sureties therein, although never formally approved as required by law. Thus it is said by Brandt that:—

"Where a statute provides that a bond with two sureties shall be given by an officer, such provision is *merely directory*, and a bond signed by one surety only, will bind such surety. A defect in the approval of an official bond cannot be set up by the sureties therein as a defense. The object of requiring the approval is to insure greater security to the public, and the sureties cannot object that their bond was accepted without proper examination into its sufficiency by the officers of the law. The failure of the justices of the orphan's court to attest a sheriff's bond, as required by law, is no objection to its validity. The attestation was not required for the benefit of the sheriff or his sureties, and formed no part of the inducement for them to enter into the contract." (Sharp v. United States, 4 Watts, Pa., 21; The Justices v. Ennis, 5 Ga., 569; Mears v. Commonwealth, 8 Watts, Pa., 223; People v. Edwards, 9 Cal., 286; McCracken v. Todd, 1 Kansas, 148; State v. Hampton, 14 La. An., 736; Young v. The State, 7 Gill & Johns., Md., 25; Brandt, Suretyship, 442; Westerhaven v. Clive, 5 Ohio, 136.)

It is clear that a collector of internal revenue, who comes into office under a temporary appointment, and is subsequently commissioned under a Senate confirmation, and who is required to give a new bond, is also required to take a new oath of office before being fully invested with the legal title to the office. The question whether an oath is required

of an officer who is not required to give any bond, but is, in other respects, similarly situated, is not considered.

It will be observed that Brandt says that, a statute requiring an officer to give a bond with two sureties is *merely directory*, and that a bond signed "by *one surety* will bind such surety." This is certainly true, if such surety signed the bond not expecting any other to sign it, or in a form to induce an officer required to approve it to suppose the one surety intended to be obligated without reference to any other surety, as he perhaps would be, if only one surety was named in the bond so executed. (*Cincinnati v. Scott*, 4 Western Law Journal, 528; s. c., 1 McVey's Ohio Dig., 94.) But this rests on the solid legal principle of *estoppel*, that a party "cannot be permitted to make his own disregard of the statute the basis for impeaching" the validity of his own act. (*Bailey v. United States*, 109 U. S., 439; *Grant & Davis case*, *ante*, 128.) It rests on solid legal maxims. (2 Inst., 66, 380; *Broom*, Legal Max., 7 Am. Ed., 35.) No man is permitted to take advantage of his own wrong. These principles are very different from those which relate to *directory* statutes. Generally "statutes imposing a duty and giving the means for its performance are mandatory." (*Bishop*, Written Laws, 256.) A statute requiring a person appointed to office to give a bond, to be approved by a designated officer, as a condition precedent to the right to take the office, certainly cannot be *directory*, in the sense that if disapproved, the legal title to office will vest notwithstanding. (*Maxwell on Statutes*, 453-456.) It cannot be *directory*, in the sense that the officer required to give or to approve, can dispense with a special statutory requirement as to the form or number of sureties. (*Id.*, 458.) So, a person appointed to office, who takes the oath of office, and tenders a sufficient bond to an officer charged with the duty of approving it, becomes invested with the legal title thereto, after a reasonable time has elapsed for its approval, wholly without reference to the doctrine of *relation*, referred to above. The title to the office vests, if the bond in such case should *never be approved*, and this shows that, the doctrine of *relation* has no material bearing on it. The title to the office vests on the solid legal principle that a party cannot be deprived of a legal right, by the failure of an officer to perform his duty in approving the bond. In such case, the principle applies at law, as well as in equity, that, that shall be considered as done, which ought to have been done. (*Place v. Taylor*, 22 Ohio St., 317; *Skellinger v. Yenders*, 12 Wend., 306; *Exporter's case*, *ante*, 25.) The bond is obligatory on the sureties by its very terms, and without reference to the doctrine of *relation*, and because the approval is not for the benefit of the sureties, but for the security of the public.

The claimant's salary will commence with the date of his oath of office, August 1, 1884.

TREASURY DEPARTMENT,

First Comptroller's Office, December 6, 1884.

IN THE MATTER OF CLAIMS UNDER SECTION 2155 OF THE REVISED
STATUTES.—FRIENDLY-INDIAN CASE.

1. Section 2155, of the Revised Statutes, imposes an obligation on the United States to make payment to friendly Indians, in the cases therein specified.
2. Said section does not appropriate money to make such payments.
3. The proper Auditor and Comptroller have jurisdiction of such claims, without reference to the existence of an appropriation for their payment.
4. Estimates may be submitted to Congress for appropriations to pay such claims.

December 15, 1884, the Second Auditor addressed a letter to the Secretary of the Treasury as follows :

SIR: Certain papers have been filed in this office touching the claim of a Creek Indian for \$32,000 stolen from him by certain white persons. The money not having been recovered from the thieves, it is sought to recover from the government under provisions of sections 2154, 2155, Revised Statutes. Before this office can assume jurisdiction in the case, it is essential to determine whether the expression "shall be paid out of the Treasury of the United States," in section 2155, is to be construed as appropriating money for the purpose, so that warrants may be drawn without further action of Congress.

It is respectfully requested that the question involved may be submitted to the First Comptroller for his decision.

December 17, 1884, this was by the chief clerk in the office of the Secretary referred to the First Comptroller "for consideration."

OPINION BY WILLIAM LAWRENCE, *First Comptroller.*

The Revised Statutes contain these sections:

SEC. 2154. Whenever, in the commission, by a white person, of any crime, offense, or misdemeanor, within the Indian country, the property of any friendly Indian is taken, injured, or destroyed, and a conviction is had for such crime, offense, or misdemeanor, the person so convicted shall be sentenced to pay to such friendly Indian to whom the property may belong, or whose person may be injured, a sum equal to twice the just value of the property so taken, injured, or destroyed.

SEC. 2155. If such offender shall be unable to pay a sum at least equal to the just value or amount, whatever such payment shall fall short of the same shall be paid out of the Treasury of the United States. If such offender cannot be apprehended and brought to trial, the amount of such property shall be paid out of the Treasury. But no Indian shall be entitled to any payment out of the Treasury of the United States, for any such property, if he, or any of the nation to which he belongs, have sought private revenge, or have attempted to obtain satisfaction by any force or violence.

The latter section *imposes an obligation* on the United States to make payment in the cases it specifies. These sections are taken from sec-

tion 16 of the act of June 30, 1834 (4 Stat., 729), being "An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers." Its purpose is to define and regulate certain rights, duties and *obligations*, growing out of trade and intercourse with the Indian tribes. Section 17 of the act guarantees to white persons, in certain cases, "an eventual indemnification" for property "taken, stolen or destroyed," by Indians. This imposes an obligation on the United States but does not appropriate money to perform it. So section 16 simply imposes an obligation on the United States in specified cases, to pay friendly Indians for their property taken, injured or destroyed in the commission, by a white person, of any crime, offense or misdemeanor within the Indian country.

About the time this act became a law it was provided in various Indian Treaties that the United States should pay specified moneys to Indian tribes. (Chickasaw Treaty, May 24, 1834, 7 Stat., 457, Art. 4; Miami Treaty, October 23, 1834; *Id.*, 458, Art. 2; Pottawatomie Treaty, Dec. 16, 1834; *Id.*, 468, Art. 2.)* These will serve as specimens. But appropriations were always deemed necessary, and were made by Congress to carry these and other similar treaties into effect. So, many acts of Congress impose obligations on the Government to pay money from the Treasury, but appropriations have always been deemed necessary for this purpose. (Rev. Stat., 3015, 3017, 3048, 3662, 3687, 3688, 3689, 3698.)

The *existence of an appropriation*, to pay claims of the class mentioned in the letter of the Honorable Second Auditor, is not essential to enable him to assume jurisdiction over them. His jurisdiction exists whether Congress appropriates money or not. (Five-Year Claims' case, 4 Lawrence, Compt. Dec., 252; Farrar's case, *ante*, 447.) If there be no appropriation for the payment of such claims, when duly allowed by the accounting officers, estimates may be submitted on request of the Secretary of the Interior by the Secretary of the Treasury to Congress for an appropriation. (Rev. Stat., 3660, 3664, 3669; Act July 7, 1884—23 Stat., 254.)

The Secretary of the Treasury will be advised to inform the Second Auditor accordingly.

TREASURY DEPARTMENT,

First Comptroller's Office, December 22, 1884.

* As to the extent of the treaty making power see in the Congressional Law Library "The Treaty Question," by William Lawrence.

IN THE MATTER OF A CLAIM, BY THE LEGAL REPRESENTATIVE OF A DECEASED OWNER OF REALTY IN BEAUFORT COUNTY, SOUTH CAROLINA, SOLD TO THE UNITED STATES, AT A DIRECT-TAX SALE, MARCH 9, 1863, FOR THE REPAYMENT OF THE SURPLUS PROCEEDS OF SAID SALE.—FRIPP'S CASE.

1. The heirs, or devisees, of a decedent, are not his "legal representatives" within the meaning of section 36 of the direct-tax act of August 5, 1861 (12 Stat., 304), but his executors or administrators are.
2. The owner of realty sold under the direct-tax act of June 7, 1862 (12 Stat., 423), as amended by act of February 6, 1863 (12 Stat., 640), or his legal representative, is entitled to the "surplus proceeds" of such sale whether the sale was made by the United States, or to a private purchaser; *provided*, that, in the latter case, the purchase money was "deposited" or "covered" into the Treasury.
3. The appropriation made by the deficiency act of March 3, 1833 (22 Stat., 595), for the payment of the "surplus proceeds" of direct-tax sales, is applicable under direct-tax sales made to the United States, as well as those made to private purchasers.
4. The construction, of said appropriation, is not affected by the fact that it was made upon *estimates* submitted to Congress based on sales to private purchasers only. The intention of Congress is to be ascertained by the words of the Statute, and the approved rules of construction.
5. *Semble*, That the "surplus proceeds" of direct-tax sales under the direct-tax acts of 1861 and 1862, should have been "*deposited*", but not "*covered*", into the Treasury, for the payment of claims therefor whenever made.

March 9, 1863, the direct-tax commissioners for South Carolina sold, to the United States for \$210, 200 acres of land known as Cedar Grove on the Island of St. Helena, Beaufort County, at a direct-tax sale made under the authority of section 7 of the act of June 7, 1862 (12 Stat., 423), as amended by act of February 6, 1863 (12 Stat., 640), to satisfy a direct-tax assessment, amounting with penalty, cost, and interest, to \$27.05, leaving as "*surplus proceeds*" of sale constructively in the Treasury of the United States \$182.95, no money having been actually paid on the sale. The United States took possession, and the larger part of the land was set apart as a School Farm, and the residue was resold in small lots to heads of families. Thomas B. Fripp owned the land up to the time when he died, intestate, October 22, 1862.

March 9, 1883, William P. Fripp applied to the Secretary of the Treasury for the payment of said surplus proceeds, after which he filed a release from all the heirs of the decedent to the claimant of any, all, and whatever claim they may have upon said surplus proceeds. It appears also that the claimant was a creditor of the decedent, and that the property sold was liable to the debts of the decedent. July 12, 1884, the Secretary of the Treasury approved the claim for \$182.95 in favor of William P. Fripp—"the claim being just and lawful, and the United States being protected from any future claim of the heirs of said dece-

dent." December 5, 1883, William P. Fripp was duly appointed administrator of said decedent. July 18, 1884, the claim was allowed by the Fifth Auditor in favor of the administrator.

Hon. William E. Earle for the claimant:

[The legal right to the money is settled. (*Lawton v. United States*, 110 U. S., 146.)]

The question is whether there is an appropriation from which it may now be paid.

There is an appropriation of \$190,000 for the payment of the "claims of the original owners of land sold for the non-payment of United States direct taxes, for the surplus proceeds of the same, under the provisions of the act of August 5, 1861."

It is true the "*estimate*" for this sum was made up, on the basis of the surplus proceeds of the purchases at said sales to *individuals*, but that cannot exclude from payment, out of this appropriation, any other claims that come within the purview of this general provision.

The naked fact that in making the estimate for this appropriation the surplus proceeds of sales whereat individuals purchased only were included, will not, of itself, limit the use of the money.

The case will be different, however, if the claims provided for are of a different class in consequence of the fact that they arise under a different law. The question here then narrows down to one of the identity of the appropriation act, *i. e.*, of the act under which the claims arise for which the appropriation was made. The appropriation act (22 Stat. 595) says, "sold * * * under the provisions of the act of Aug. 5, 1861."

This act of Aug. 5, 1861 (12 Stat. 304), provides for the general sale of the lands without reference to purchasers, and that the surplus proceeds should be "deposited in the Treasury of the United States to be there held for the use of the owner or his legal representatives."

No single sale of lands was ever made under *this* act of Aug. 5, 1861. It might have been done, but it never was. In the loyal States the taxes were generally assumed by the States and a small portion was collected by national machinery. Those in Delaware were under a special act (Feb'y 21st, 1868, 15 S. L. 36). In the other loyal States much remained unassumed and unpaid when the collection was "suspended." No attempt was ever made to enforce the act of Aug. 5, 1861, in any of the disloyal States. The taxes collected and the sales made then were under a special act for insurrectionary districts (12 Stat. 422) the 7th sec. whereof was wholly changed by a "substitute" (not an amendment), on the 6th of Feb'y, 1863 (12 Stat. 640).

The sales, then, all of them, were made under the act of June 7th, 1862.

If the appropriation, therefore, does not apply to those whereat the United States became the purchaser, and for the reason that it was not authorized to bid over the tax and costs by the act of August 5, 1861, then this appropriation is not applicable to any sales, for there were none under the act of August 5, 1861.

Stated differently: The appropriation is to pay surplus proceeds of sales made under the act of Aug. 5th, 1861; no sales were made under that act, therefore the appropriation cannot be used to pay the surplus proceeds of any sales.

There were sales made under the act of June 7, 1862, as amended (by *substitution* on February 6th, 1863), and *all* the sales which were made

were under this act, and if the appropriation is applicable to any of them, it is to *all*, for no distinction is made in the appropriation act as to the purchasers, but it is general the surplus proceeds of *sales*.

In the Taylor case, the Supreme Court says expressly that the Acts of Aug. 5th, 1861, and June 7th, 1862, "are to be construed as if passed at the same time."

There is no difference whatever between the claims of the "original owners" for "surplus proceeds" of direct-tax sales growing out of the fact that individuals bought some of the lands, and the United States bought others.

The Court of Claims (18 Ct. Cl. 602) says: "The United States became a general competitor at the vendue, like any other bidder, and obtained the property as such."

The Supreme Court (110 U. S. 149) affirmed this decision, saying—"We think that this case is governed" (not by the *principles* but) "by the *rulings* of this court in *U. S. vs. Taylor*, 104 U. S. 216." It then goes on concisely to show that it is, and says the surplus "must be regarded as being in the Treasury of the United States, under the provisions (now of what law) of section 36 of the *Act of 1861*."

Now, that is exactly the act for which the appropriation was made in *terms*. But the court goes on to explain how, under the provisions of that Act, to wit: "for the use of the owner, in like manner as if it were the surplus of purchase money received by the United States from a third person on a sale of the land to such person for the non-payment of the tax."

Under the decisions of the Court the difference between the rights of "the original owners" were the same exactly whether individuals or the United States bought the lands.

DECISION BY WILLIAM LAWRENCE, *First Comptroller*.

The only provision for the payment of the "surplus proceeds" of direct-tax sales is that found in section 36 of the act of August 5, 1861, (12 Stat., 304). It authorizes payment to be made "to the owner of the property [sold] or his legal representatives." The allowance in this case in favor of William P. Fripp personally cannot be sustained. A claim can only be made by the administrator of Thomas B. Fripp. The administrator is the "legal representative." The claimant has been appointed administrator of the decedent, and in his favor as such the claim may now be considered.

The direct tax of August 5, 1861 (12 Stat., 292, 304), authorized sales of realty to be made to private purchasers, but did not authorize the direct-tax commissioners, in making a sale, to "strike off the same * * to the United States." This was authorized by the act of June 7, 1862 (12 Stat., 423, sec. 7), as amended by act of February 6, 1863 (12 Stat., 640). These acts constitute parts of one system, and are to be construed together as such. (*United States v. Taylor*, 104 U. S., 219.) Upon this construction the right of the original owner of realty, or his legal representatives, to be paid the surplus proceeds of a direct-tax sale under section 36 of the act of August 5, 1861 (12 Stat., 304), arises as

well when realty is sold to the United States, as when sold to any private purchaser. Thus, in *United States v. Lawton* (110 U. S., 149), it is said:

"The land in the present case, having been "struck off for" and "bid in" for, the United States * * * we are of opinion that the surplus proceeds of sale * * * must be regarded as being in the Treasury of the United States, under the provisions of section 36 of the act of [August 5] 1861 (12 Stat. 301) for the use of the owner in like manner, as if it were the surplus of purchase money received by the United States from a third person on a sale of the land to such person for the non-payment of the tax."

The only remaining question is whether there is an appropriation available to pay the claim made in this case. The act of March 3, 1833 (22 Stat., 582, 595), has a title and provisions as follow:

CHAP. 141.—An act making appropriations to supply deficiencies in the appropriations for the fiscal year ending June thirtieth, eighteen hundred and eighty-three, and for prior years, and for those certified as due by the accounting officers of the Treasury in accordance with section four of the act of June fourteenth, eighteen hundred and seventy-eight, heretofore paid from permanent appropriations, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums be, and the same are hereby, appropriated, out of any money in the Treasury not otherwise appropriated, for the objects hereinafter stated, namely:

* * * * *

The Secretary of the Treasury is hereby authorized and directed to cause to be audited by the proper accounting officers of the Treasury and paid the claims of the original owners of lands which were sold for non-payment of United States direct taxes, for the surplus proceeds of the same, under the provisions of the act of August fifth, eighteen hundred and sixty-one, and for such purpose the sum of one hundred and ninety thousand dollars, or so much thereof as may be necessary, is hereby appropriated.

This act is not, as to all appropriations it makes, an ordinary annual appropriation act, making appropriations for a designated fiscal year. If it were so, the appropriation for the payment of surplus proceeds of direct-tax sales, is now available. But this appropriation is *permanent specific* in character, and is available until its purposes are accomplished. That appropriation was made on estimates transmitted to Congress for the payment of surplus proceeds arising from sales to private purchasers—not for such surplus arising from sales made to the United States. But it does not, by any means, follow that, Congress intended to limit the appropriation to surplus proceeds arising from one class of sales. (*Artificial Limbs case*, 2 Lawrence, Compt. Dec., 2d ed., 384, 401; *Blake v. National Bank*, 23 Wall., 307, 317.) The appropriation now under consideration is remedial, and to be liberally construed. It is not in its *terms* limited to surplus proceeds arising from sales made to private purchasers. There is nothing to show that Congress intended any such limitation. The appropriation is, in effect, not specifically for

surplus proceeds arising from sales made under the act of August 5, 1861, but for the payment of the *surplus proceeds* which section 36 of *said act* *authorizes to be paid*, and this includes such proceeds arising from *all sales*, as already shown. The right exists to demand payment of surplus proceeds from sales made to the United States, as well as from those made to private purchasers. (*United States v. Lawton*, 110 U. S., 149.) The right to payment exists in the latter class of sales, only when the proceeds of sale have been paid into the Treasury. Strictly speaking, no sales were made under the act of August 5, 1861. To limit the appropriation to sales made under that act, would nullify the object of making it, a result which, by a well known rule of construction, is always to be avoided. The surplus proceeds of sales to private purchasers were actually "*covered*" into the Treasury, whereas, it would seem, the purpose of section 36 of the act of August 5, 1861, was, that they should have been merely "*deposited*" in the Treasury subject to be paid out on demand of claimants without any appropriation act. The purpose of the appropriation made by act of March 3, 1883, was to furnish the means of paying *all* claims for surplus proceeds however arising.

The administrator, claimant, in this case, will be paid accordingly.

TREASURY DEPARTMENT,

First Comptroller's Office, December 23, 1884.

IN THE MATTER OF THE RIGHT OF THE OTOE AND MISSOURIA CONFEDERATE TRIBES OF INDIANS TO INTEREST ON THE "REMOVAL FUND" SET APART UNDER SECTION 5 OF THE ACT OF MARCH 3, 1881 (21 STAT., 381); THE MODE OF COMPUTING SAID INTEREST, AND THE PROPER DISPOSITION THEREOF.—OTOE AND MISSOURIA INDIAN CASE.

1. The Otoe and Missouri confederate tribes of Indians are entitled to interest at five per cent. per annum on the "removal fund" set apart by authority of section 5 of the act of March 3, 1881 (21 Stat., 381), from the date of the transfer warrant, August 13, 1881, by which it was so set apart, to the date of the first warrant charged against said fund, and thereafter, at the same rate, upon the reduced principal ascertained from time to time by the deductions of the amounts paid.
2. Accumulations of interest so computed do not become new principal, nor do they bear interest.
3. The interest so ascertained constitutes no part of the "removal fund," but is "income" to be expended under the direction of the Secretary of the Interior, for the benefit of the Indians.
4. The Treasury Department construction of the fourth section of the act of August 15, 1876 (19 Stat., 208), in connection with sections 2093 and 2094 of the Revised Statutes, and the treaties of March 15 and December 9, 1854 (10 Stat., 1038 and 1130), is that they make an appropriation to pay interest on the net proceeds of the sales of land made by virtue of said act.

The treaty of March 15, 1854, with the confederate tribes of Otoe and

Missouria Indians (10 Stat., 1038), as amended by treaty of December 9, 1854 (10 Stat., 1130), makes a reservation for said tribes, and provides for the payment to them by the United States of certain annuities, which have been paid. (Act July 4, 1884—23 Stat. 83; act May 17, 1882—22 Stat. 76; act March 1, 1883—22 Stat. 440), &c.

The act of August 15, 1876 (19 Stat., 208), as amended by act of March 3, 1879 (20 Stat., 471), authorizes the Secretary of the Interior to cause 120,000 acres from the west side of said reservation to be appraised, surveyed and sold, on terms and conditions therein provided, and provides that the cost of appraisal, survey, and all other necessary incidental expenses of the execution of said act, shall be paid from the money realized by the sale of said lands. The fourth section of said first-named act is as follows:

"That the proceeds of said sale shall be placed to the credit of said Indians in the Treasury of the United States, and bear interest at the rate of five per centum per annum, which *income* shall be expended for the benefit of said tribes under the direction of the Secretary of the Interior."

The act of March 3, 1881 (21 Stat., 380), authorizes the Secretary of the Interior to cause to be appraised, surveyed and sold the remainder of the reservation, on terms and conditions therein stated, and then provides as follows:

SEC. 4. That the proceeds of the sale of said lands shall be placed to the credit of said Indians in the Treasury of the United States, and shall bear interest at the rate of five per centum per annum, which *income* shall be annually expended for the benefit of said Indians under direction of the Secretary of the Interior.

SEC. 5. That the Secretary of the Interior may, with the consent of the Indians, expressed in open council, secure other reservation lands upon which to locate said Indians, cause their removal thereto, and expend such sum as may be necessary for their comfort and advancement in civilization, not exceeding one hundred thousand dollars, including cost of surveys and expense of removal, the *same to be drawn from the fund arising from the sale of their reservation lands* under the act approved August fifteenth, eighteen hundred and seventy-six.

The proceeds of sales are subject to various charges to reimburse the United States for advances for expenses and other purposes. See Act August 15, 1876 (19 Stat. 187); Act March 3, 1877 (19 Stat. 282); Act August 7, 1882 (22 Stat. 328); Rev. Stat. 2093, 2096.

The lands have been sold as authorized by the acts of August 15, 1876, and March 3, 1879, and the proceeds covered into the Treasury. August 13, 1881, by Treasury transfer warrant No. 912, the sum of \$100,000, part of the net proceeds of sales made under said acts last above named, was set apart as a "removal fund" under section 5 of the act of March 3, 1881 (21 Stat., 381), and carried on the proper books in the Register's office to the credit of that fund. This fund has been exhausted by sundry payments therefrom.

No interest has been computed on said fund, nor carried to the credit of any account. There has been a correspondence between the Secre-

tary of the Treasury and the Secretary of the Interior on the subject of interest on this fund, in which the latter expressed the opinion "that the interest should be allowed, from the date of the transfer warrant [August 13, 1881], setting aside the amount received [\$100,000] up to the date of the first warrant charged to the said fund, and that thereafter the interest should be calculated upon the reduced principal, ascertained from time to time, by the deduction of the amounts paid, until the whole sum shall have been expended or disposed of."*

December 9, 1884, the Acting Secretary of the Treasury referred the whole correspondence to the First Comptroller for "report on the question of the right of the Otoes and Missourias to receive interest on the average balance of the \$100,000 set apart for special purposes by the act of March 3, 1881 (21 Stat., 381)."

OPINION BY WILLIAM LAWRENCE, *First Comptroller*.

The United States is not generally bound to pay interest on claims, whether arising out of a contract or otherwise. (1 Opinions Att.-Gen., 55; 2 *Id.*, 463; 3 *Id.*, 639; 4 *Id.*, 136, 292; 5 *Id.*, 72, 105, 138, 351; 6 *Id.*, 533; 7 *Id.*, 523; 9 *Id.*, 59; 14 *Id.*, 30; *Todd v. United States*, Devereaux C. C., 95; *United States v. McKee*, 91 U. S., 450; Lawrence's "Law of Claims against Governments," House Rep., No. 134, 2d Sess. 43d Cong., 218-241; *Gorden v. United States*, 7 Wall., 188; *Stephani's case*, 1 Lawrence, Comp. Dec., 34.) There are exceptional cases in which interest has been allowed. 5 Opinions Att.-Gen., 105, 138, 227, 399. But by express statute the public loans bear interest, and interest has frequently been provided for by express act of Congress (7 Op. Att.-Gen., 523).

The fund now in question is a part of the net proceeds of sales of the Otoe and Missouri reservation, and as to which the act of August 15, 1876 (19 Stat., 208), expressly provides that said proceeds "shall be placed to the credit of said Indians, in the Treasury of the United States, and bear interest at the rate of five per centum per annum, which income shall be expended for the benefit of said tribes." This act thus provides a *permanent fund*, consisting of the net proceeds of sales of land, to bear interest at the rate of five per cent. per annum, said *interest*, as *income*, to be expended for the benefit of the tribes. The act of March 3, 1881 (21 Stat., 381), however, changed said arrangement only so far as to authorize an expenditure from the *principal sum* of said fund, of not exceeding \$100,000 for four objects, which appear in the statute with its language somewhat transposed, more clearly to show its purpose, as follows, to wit: (1) to "secure other reservation lands upon

* The letters are as follows:

Secretary of the Treasury to Secretary Interior December 13, 1881; Commissioner of Indian Affairs to Secretary of the Interior December 17, 1881; Secretary of the Interior to the Secretary of the Treasury, December 21, 1881; Acting Secretary of the Treasury to the Secretary of the Interior, December 30, 1881; Commissioner of Indian Affairs to the Secretary of the Interior, November 29, 1884; Secretary of the Interior to the Secretary of the Treasury, December 1, 1884.

which to locate said Indians, (2) [to] cause their removal thereto, (3) and expend such sum as may be necessary for their comfort and advancement in civilization, and pay (4) cost of surveys [of the new reservation] and expense of removal, [in all] not exceeding \$100,000, the same [for the four purposes named] to be drawn from the [principal sum of] the *fund arising from the sale of their [original] reservation lands under the act approved August 15, 1876.*"

This very clearly, and in express terms, requires the whole sum expended, not exceeding \$100,000, for the whole four purposes named, to be taken from the net proceeds of sales, and *no part of it from interest arising on said proceeds.* The original act of August 15, 1876 (19 Stat., 208), *remains in force in all respects*, except so far as *clearly modified* by the act of March 3, 1881 (21 Stat., 381), and the provisions of the former act so remaining unchanged, require, amongst other matters, (1) the payment of interest at five *per centum per annum* on the unexpended portion of said sum of \$100,000, and (2) the expenditure of this interest ["income"] "for the benefit of said tribes" in some manner, or for some objects *other than* the four for which said sum of \$100,000 was to be expended.

Under the act of August 5, 1876 (19 Stat., 208), the five per cent. annual interest, arising from the net proceeds of sales, was to be "expended for the benefit of said [Indian] tribes *under direction of the Secretary of the Interior.*" If, in his judgment, a necessity did not arise for the expenditure of all of it, the interest simply remained in the Treasury unexpended. It could not become new principal bearing interest. Past due interest can only become new principal to bear interest, either by force of (1) a statute, by (2) express contract, or (3) by usage, which the law annexes as an incident of contract. (3 Parsons, Cont., 6th ed., 102 [111]; 1 Greenl., Ev., 294; *Young v. Godbe*, 15 Wall., 562.)

In *Brewster v. Wakefield* (22 How., 127), it appeared that one party gave another a promissory note, payable after a specified date, with no stipulation in relation to interest after the note became due, but in a State in which the statute authorized parties to contract for any rate of interest, and fixed the legal rate at seven per cent., when no rate was agreed on. The court said as to the right to interest after maturity of the note that "if the right to interest depended altogether on contract and was not given by law * * * the appellee [payee of the note] would be entitled to no interest whatever after the day of payment." As to the *accrued interest* now under consideration *no statute or contract, express or implied*, gives to the Indians a right to interest thereon. The usages between private persons as to interest are not generally applicable to, and do not make, law imposing a liability therefor on the United States, because (1) they have never been adopted in practice, (2) the Government unlike such persons is always, in legal contemplation, ready, able and willing, to pay its debts, and (3) it would be prejudicial to public interests to allow creditors of the Government to receive interest as a reward for their negligence in presenting claims for payment, or for a

wilful failure so to present them. (*United States v. Bank of United States*, 5 How., 382, 399; 7 Op. Att.-Gen., 599; 8 Op. Att.-Gen., 1.) This is not a case in which to apply in the mode of computing interest what is known as the "legal rule," because every payment made from the "removal fund" is from the original principal of said fund, and in no part from any interest thereon accruing or accrued. (*Story v. Livingston*, 13 Pet., 359; *McGill v. Bank of United States*, 12 Wheat., 511.) The result is:

1. Interest at five *per cent. per annum* is to be computed on the "removal fund" of \$100,000, from the date of the transfer warrant, August 13, 1881, to the date of the first warrant charged to said fund, and thereafter interest is to be computed at the same rate upon the reduced principal ascertained from time to time, by the deduction of the amounts paid.

2. Accumulations of interest do not become new principal, nor do they bear interest.

3. The interest so ascertained constitutes no part of the "removal fund," but is to be expended as "income", for the benefit of the Indians, under the direction of the Secretary of the Interior.

The Treasury Department has in practice construed section 4 of the act of August 15, 1876 (19 Stat., 208), in connection with sections 2093 and 2094 of the Revised Statutes, and the treaties of March 15, and December 9, 1854 (10 Stat., 1038, 1130), as making an appropriation for the payment of interest on "Otoe and Missouri fund," being the fund arising from net proceeds of sales of lands.

The Secretary will be advised accordingly.

TREASURY DEPARTMENT,

First Comptroller's Office, December 24, 1884.

IN THE MATTER OF THE RIGHT TO PAYMENT OF MONEY STANDING ON THE BOOKS OF THE TREASURY DEPARTMENT TO THE CREDIT OF THE LATE JUDSON KILPATRICK FOR CONTINGENT EXPENSES DISBURSED BY HIM AS LATE MINISTER TO CHILI.—KILPATRICK'S CASE.

1. Money due from the United States to a party at the time of his decease becomes assets of his estate to be administered by his legal representatives.
2. The right of such legal representatives to payment of money so due is *property*, which cannot be divested by act of Congress.
3. The *re-appropriation* made by the act of July 7, 1884 (23 Stat., 194), of money, and which makes it "available to pay the widow" of such deceased creditor, was only designed to pay the legal claimant.
4. The United States, before making payment of a sum to which there are or may be adverse claimants, may require them by agreement, or by proper legal proceedings, to determine which party shall receive payment.

General Judson Kilpatrick, late United States Minister to Chili, died at his post, December 2, 1881. He left a will, naming his wife, Mrs. Luisa V. de Kilpatrick, and Theodore F. Margarum, of New Jersey,

as executors. By report No. 98890, which was certified by the Comptroller, July 25, 1883, there was allowed to the said Judson Kilpatrick the sum of \$559.11, for contingent expenses disbursed during the quarter which ended December 31, 1881, and said amount now stands to his credit on the books of the Treasury.

On the 30th of June, 1884, the appropriation for "Contingent Expenses Foreign Missions," 1882, from which the above amount was payable, was, under the operation of law, carried to the Surplus Fund. At the instance and request of the Secretary of State, the aforementioned sum of \$559.11 was re-appropriated by Congress in the Sundry Civil Appropriation act, approved July 7, 1884 (23 Stat., 194), in the following terms:—

"That the sum of five hundred and fifty-nine dollars and eleven cents of the unexpended balance of the appropriation for contingent expenses foreign missions, eighteen-hundred and eighty-two, be, and the same is hereby re-appropriated and made available to pay the widow of General Judson Kilpatrick, late United States Minister to Chili, the amount found due him on the settlement of his accounts for contingent expenses of the legation of the United States in Chili in eighteen hundred and eighty-two."

The Assistant Secretary of State, in his letter to the First Comptroller of November 24, 1884, raises the question for the decision of the Comptroller, whether the foregoing amount can be properly paid to the widow of the late General Kilpatrick, and expresses the opinion "that the money should be paid direct to the widow." A copy of a letter—dated August 4, 1884, from Mr. Theo. F. Margarum, the executor, residing in New Jersey, addressed to the Disbursing Clerk of the Department of State, in which Mr. Margarum declines to execute a release as to the amount in question, stating that if it is due to the widow, it is something over which he has no control, but if the money is due to the estate of General Kilpatrick, of which he (Margarum) is the executor, he will receive it and execute the proper voucher—is also transmitted.

The question is submitted for the decision of the Comptroller, as to how payment should be made.

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OPINION BY WILLIAM LAWRENCE, *First Comptroller.*

Upon the decease of General Kilpatrick the sum of \$559.11, previously disbursed by him, and subsequently certified as due him, became assets of his estate, to be administered by his legal representatives. They could have recovered this sum in an action in the Court of Claims. (Rev. Stat., 1059.) Without any such action there was an appropriation (Act February 24, 1881—21 Stat., 340) legally applicable to its payment to *such legal representatives* which continued available until July 1, 1884. (Act June 20, 1874—18 Stat., 110; Act June 14, 1878—

20 Stat., 130.) Their right to its payment is *property* so sacred that an act of Congress cannot divest it.

Thus it is said:

"A vested right of action is *property* in the same sense in which tangible things are property, and is equally protected against arbitrary interference. Where it springs from contract, or from the principles of the common law, it is not competent for the legislature to take it away." (Cooley, Const. Lim., [362] 449, citing numerous authorities; Const. U. S., Art. 5, and 14 Amendments; *Griffin v. Wilcox*, 21 Ind., 370; *Johnson v. Jones*, 44 Ills., 142; *Hubbard v. Brainard*, 35 Conn., 563; *Bryan v. Walker*, 64 N. C., 146).

The right of the proper legal representatives to demand payment most clearly would have remained undoubted and unquestioned, but for that provision of the act of July 7, 1884, which provides for a re-appropriation of \$559.11, and makes it "available to pay the widow of General Judson Kilpatrick * * * the amount found due him on the settlement of his accounts." In ascertaining the intention of Congress rules of construction are to be observed, that, statutes are to be so construed, if practicable, as "to avoid absurd consequences, or injustice." (Bishop, *Written Laws*, 82, 90, 93, 200;) that, "if there are two possible constructions of the statute, the one harmonious with the Constitution and the other opposed, the one harmonious must be adopted." (*Id.*) In view of these principles, it may be assumed that the object of the *re-appropriation* was simply to effect the purpose of the original appropriation—to make the payment required by law. The widow had, in fact, been named as an executrix in the will of her deceased husband, and Congress may have assumed, in the act of July 7, 1884, that she had qualified or would qualify as such, and so simply intended to make provision for the legal payment to her, not in her personal right, but in her representative character as executrix. There is nothing to indicate that Congress intended to provide a gratuity to her personally, and it is not to be assumed that it was designed to disregard the obligation to pay the legal representatives or to attempt to divest their legal right to payment. It is only reasonable that, in making any payment, the United States should be protected from any future claim. And, since it is understood that some claim is, or may be, made by said widow for payment, and the one executor named in the will, who has qualified, declines to release in favor of the widow, the honorable Secretary of State will be advised to make no requisition for payment until the widow and the qualified executor shall file a written agreement and proper release of claim, in a form to protect the United States, or determine, by proper legal proceedings, to which of said parties payment shall be made.

TREASURY DEPARTMENT,

First Comptroller's Office, December 26, 1884.

IN THE MATTER OF THE RIGHT OF A UNITED STATES DISTRICT ATTORNEY TO MILEAGE, UNDER SECTION 824 OF THE REVISED STATUTES, FOR GOING FROM THE PLACE WHERE THE COURT, ON WHICH HE IS IN ATTENDANCE, IS HELD TO THE PLACE OF HIS ABODE, AND FOR RETURNING TO SUCH COURT, DURING A SUNDAY OR OTHER ADJOURNMENT OF SAID COURT.—DISTRICT ATTORNEY'S MILEAGE CASE.

1. The right of a United States District Attorney to mileage for travel, and to *per diem* compensation, rests *solely* on the statute, and its proper construction.
2. When the statute gives a right to mileage, or compensation fixed in amount, accounting officers have no authority to make any stipulation for the payment of more or less than the amount so prescribed.
3. A district attorney is entitled to a *per diem* fee, for "*attendance*" during a term of court away from the place of his abode, for Sundays and holidays included in said term.
4. If a court adjourn over, making a *recess* during a term, for a period not covered by a Sunday or holiday, the district attorney is not entitled to a *per diem* fee during such recess.
5. A district attorney is not entitled to mileage for going to his place of abode during such recess, nor for returning therefrom to the court.
6. The *Per Diem* case (1 Lawrence, Compt. Dec., 2d ed., 258); *Sunday Per Diem* case, *ante*, 325; and *Marshal's Sunday Per Diem* case, *ante*, 329—*reaffirmed*.
7. The common law adapts itself to circumstances, but statutes do not.

James Auld, the chief of the Judiciary Division of the office of the First Comptroller, submits a statement and questions for decision, as follow:

"The United States District Attorney for the southern district of Ohio, in his account for the quarter ended June 30, 1884, charged mileage from Cincinnati, the place where United States courts were in session, to Glendale, the place of his abode, and back 15 miles each way, for every Sunday (but no *per diem* fee for that day) during the April term of the courts, and one round trip when an adjournment of two weeks took place. The said charges are in accordance with a rule of this office established about thirty years ago, which is supposed to have been made in consequence of a decision respecting *per diem* compensation. By act of February 26, 1853 (Rev. Stat., 824), a *per diem* is allowed for each day of a term to district attorneys for attendance in the courts when they are held elsewhere than at their respective places of abode. On the 5th of May, 1853, the Comptroller, Mr. Whittlesey, issued circular instructions to the officers of courts, in which the following construction was given to said provision:

"The *per diem* allowed to attorneys, clerks, and marshals is for attendance on such court or courts while actually in session when held at the place of their abode, but when held at a different place from their abode they are authorized to charge for Sundays or holidays embraced in the term of a court."

From this construction of the statute it would seem to have resulted that when a district attorney, away from his place of abode in attendance upon court, wished to spend Sundays at home, he was allowed

mileage in lieu of the *per diem* fees. The question is now raised whether such allowances are authorized by law. The only mileage prescribed for a district attorney is:

'For traveling from the place of his abode to the place of holding any court of the United States in his district, or to the place of any examination before a judge or commissioner, of a person charged with crime, ten cents a mile for going and ten cents a mile for returning.' (Rev. Stat., 824.)"

This does not in terms preclude the allowance of mileage for more than one trip for a term or examination. In the case of a marshal the provision is:

'For traveling from his residence to the place of holding court to attend a term thereof, ten cents a mile for going only.' (Rev. Stat., 829.)

"This seems to imply mileage for one trip. If it be held that mileage for actual travel to spend Sundays at home should be allowed in lieu of the *per diem* fee chargeable when Sunday is spent at the place where court is held, is the amount charged to be allowed when it exceeds the *per diem* fee? And if not, what ought to be allowed when there is an adjournment of more than one day? For instance, the United States attorney for Nebraska lives at Lincoln, 68 miles from Omaha, where the court is held, and he generally charges for travel to and from home during several adjournments of from two to six days in the terms—the round trip at each adjournment amounting to thirteen dollars and sixty cents. If in his case five dollars on account of mileage to go home on Sundays is allowable, should there be any deduction from the full mileage (\$13.60) for travel at each of the adjournments of several days?"

DECISION BY WILLIAM LAWRENCE, *First Comptroller*.

The right of district attorneys to mileage rests *solely* on the statute. Whatever it authorizes can be paid, whatever it does not authorize cannot be paid. (Meigs' case, 4 Lawrence, Compt. Dec., 620, 628; Contempt case, *ante*, 257; Heller v. Commissioners, 23 Kansas, 128). It is clear that, when the statute gives a right to compensation in a given case, or to mileage under specified circumstances, accounting officers cannot dispense with the statute or make stipulations for allowing more or less than it gives. No statute has given them any dispensing power or authority to give a measure of compensation, or sum as mileage, either greater or less, or in lieu of, the provision so made by law. If the accounting officers can allow, to the district attorney for the southern district of Ohio, three dollars for mileage, in going to and returning from Glendale to Cincinnati, during a Sunday adjournment of court, and in lieu of five dollars as *per diem* compensation for said Sunday, the United States would profit two dollars by the arrangement. But, if, under similar circumstances, the accounting officers should allow the district attorney in Nebraska \$13.60 for going from Lincoln to Omaha, and for returning, in lieu of five dollars *per diem* for Sunday, the United States would lose \$8.60. It is absolutely certain, that the rights of the two district attorneys in the cases mentioned, and in the similar cases

stated, are to be determined by the statute, and not by any commutation, stipulation, or exercise of a dangerous discretion. The real question therefore is, what, if any, allowance is a district attorney entitled to, in the cases stated? This question has been decided in *Sunday Per Diem* case (*ante*, 325), in which it was held that a district attorney for "attendance," during a term of court, away from the place of his abode, is entitled to *per diem* fees for Sundays included in said term. The statute gives this to the district attorney "for his attendance when the court is held elsewhere [than] at the place of his abode," and, hence, in consequence of his absence from his abode. The provision thus made is the full measure of compensation provided by the statute, and being based on the ground, or for the reason, that the district attorney is away from his abode, and in "attendance" at the court, or the place where it is held, he cannot convert a Sunday adjournment into an occasion for returning to his abode, and thence returning to the court and demanding mileage therefor. The statute which authorizes the payment of mileage to a district attorney "for traveling from the place of his abode to the place of holding any court of the United States in his district" (Rev. Stat., 824), comes to us from a period when there were no railroads, and when speedy transit was impossible, in view of which, as well as of the words of the statute, and the provision for a Sunday *per diem*, it must be held that Congress did intend to authorize payment of such *per diem*, but did not intend to authorize payment of mileage in lieu thereof. (Act February 26, 1853—10 Stat., 161.) Mileage to district attorneys was first prescribed by act of May 8, 1792. It gave to the clerk of the circuit and district courts "at the rate of ten cents per mile for his expenses and time in traveling from the place of his abode to either of said courts," and to the attorney of the United States for the district "the like compensation for traveling as is above allowed to the clerk of the circuit and district courts." (1 Stat., 277.)

If a district attorney does return from "the place of holding any court to the place of his abode" during a Sunday adjournment, and so is not actually in "attendance," the question will arise, whether he is, in such case, entitled to a *per diem* for such Sunday. The statute, as it says, gives the district attorney the *per diem* "for his attendance when the court is held elsewhere" than "at the place of his abode." If he absent himself from the place where the court is held, he cannot be in "attendance" there. If the court be in session, either on *Sunday* or *Monday*, and the district attorney should then be at the place of his abode, he clearly would not be in "attendance" at the term, and so would not be entitled to a *per diem* fee. If the court should adjourn over from Saturday until Tuesday, and the district attorney should be at his place of abode attending to his private business, he would not be in "attendance" at the term of court, and would not be entitled to a *per diem* fee. It is no answer to this to say that, his actual attendance at the place where the court holds its term could be of no service to

the Government. His actual attendance, when the court is in session, may, for a given day, be of no service to the Government. The compensation is given for the "*attendance*," without reference to its value. It is given for the real or supposed loss, or inconvenience, resulting from actual attendance, away from his place of abode. Attendance is the *condition precedent* to the right to compensation, and when the statute requires it, as it does, there is no dispensing power over the law, by which its requirement can be disregarded.

A question of some difficulty arises as to the right of a district attorney to mileage, when a court at which he is in *attendance*, held away from the place of his abode, adjourns over for several days. If, during such *recess*, he returns to his place of abode, and remains there or elsewhere during such recess, and returns to the court on its reassemblage, is he entitled to mileage for such travel? General laws of the United States which allow compensation to public officers provide remuneration only for services in behalf of the Government. But travel of a district attorney from a place where court is held to the place of his abode—in the recess of a term—is not made in the interest of the Government, it is solely for his personal comfort or convenience. The statute makes the following provisions as to mileage:

For the district attorneys:

"For traveling from the place of his abode to the place of holding any court of the United States in his district, or to the place of any examination before a judge or commissioner, of a person charged with crime, ten cents a mile for going and ten cents a mile for returning."

For the clerks of courts:

"For traveling from the office of the clerk, where he is required to reside, to the place of holding any court required by law to be held, five cents a mile for going and five cents a mile for returning, and five dollars a day for his attendance on the court while actually in session."

For the marshal:

"For traveling from his residence to the place of holding court, to attend a *term* thereof, ten cents a mile for going only."

These provisions are all taken from the act of February 26, 1853 (10 Stat., 161-167).

At the time those provisions were made, and especially during the existence of the act of May 8, 1792 (1 Stat., 277), the present facilities for rapid travel were unknown; when a term of court commenced it usually went on uninterruptedly until its close, except by adjournment for Sundays and holidays, and, in practice, officers of the court never, or rarely ever, returned to their homes during a term. It is in view of *these conditions* that the statute gives mileage to a marshal, "for traveling from his residence to the place of holding court to attend a term thereof * * * for going only"; to the clerk, "for traveling from the office of the clerk * * * to the place of holding any court * * * and * * * for returning"; to the district attorney, "for

traveling from the place of his abode to the place of holding any court * * * for going * * * and for returning." These provisions should all be considered together to ascertain the purpose of Congress. As to the marshal, it is evident that Congress contemplated the payment of only *one* mileage—"for going, only, * * * to attend a term." This recognizes the right to *one mileage only for the whole term*. As to the clerk and district attorney there is substantially the same provision, for "traveling from the place of his abode * * * to the place of holding any court * * * for going and for returning." This contemplates but one mileage for one term "of holding any court," thus placing the clerk and district attorney on the same footing as the marshal. The statute gives the marshal ten cents per mile for travel to attend a term "for going only," and the clerk five cents per mile for going and five cents per mile for returning, and the district attorney ten cents per mile for going and ten cents per mile for returning. The limitation to one travel for one term "of holding any court" necessarily arises from the language of the statute, because it distinctly declares that the mileage is for traveling (1), starting "from the place of abode," and then (2), "for returning" from the court to the place of abode. This view is strengthened by the provision which gives to the district attorney a *per diem* fee for "each day of his necessary attendance * * * in a court * * * when the court is held at the place of his abode, and for his attendance when the court is held elsewhere, five dollars for each day of the term." This authorizes attendance for each day of the term of a court held elsewhere than at the abode of the attorney. (Per Diem case, 1 Lawrence, Compt. Dec., 2d ed., 256.) If a court adjourns over, making a recess during a term, for a period not covered by a Sunday or holiday, the district attorney is not entitled to a *per diem* fee during such recess. (Per Diem case, 1 Lawrence, Compt. Dec., 2d ed., 258.) This latter case, *Sunday Per Diem case, ante*, 325, and *Marshal's Sunday Per Diem case, ante*, 329, are re-affirmed. It must be conceded that the rulings now made reverse some usages of long standing. But the statutes in question, properly construed, support the conclusions reached. Our present conditions have outgrown the statutes, but this cannot change their meaning. The common law adapts itself to new conditions, but statutes do not. At common law, when the reason of a rule ceases, the rule itself ceases. Its flexibility, founded on solid reasons, is one of its chief advantages.

No question is decided as to the right of a district attorney to receive mileage for going to or returning from an *adjourned* term of court.

The questions submitted are decided as hereinabove stated.

TREASURY DEPARTMENT,

First Comptroller's Office, December 29, 1884.

IN THE MATTER OF LEAVES OF ABSENCE TO CLERKS AND EMPLOYÉS
OF THE TREASURY DEPARTMENT.—SUPPLEMENT TO CLERK'S ABSENCE
CASE, *ANTE*, 34.

1. The Secretary of the Treasury has authority to prescribe regulations, under the act of March 3, 1883 (22 Stat., 563, sec. 4), relative to absence of clerks and employés of the Treasury Department.
2. The expression in said act, "thirty days in any one year," refers to the *calendar* year.
3. The Treasury Department regulations on the subject.

The Secretary of the Treasury has authority to prescribe regulations to execute the purposes of the act of March 3, 1883 (22 Stat., 563, sec. 4), relative to the absence of clerks and employés of the Treasury Department authorized by said act (Rev. Stat., 161). Soon after said act was passed, the question arose whether the absence, "which shall not exceed thirty days in any one year," was to be computed by *calendar* or *fiscal* years. To secure uniformity, the question was made the subject of consultation by the heads of Executive Departments, and it was concluded that the year mentioned is the *calendar* year. The regulations of the Treasury Department, on the subject of absence, are as follows :

CIRCULAR.

LEAVES OF ABSENCE, ETC.

[1884.—Department No. 182.—Division of Appointments.]

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
Washington, D. C., December 22, 1884.

*To the Heads of Bureaus, Treasury Department,
and Chiefs of Divisions, Secretary's Office, Treasury Department:*

The act of Congress approved March 3, 1883, provides "that * * * all absence from the Departments on the part of * * * clerks or other employés, in excess of such leave of absence as may be granted by the heads thereof, which shall not exceed thirty days in any one year, except in case of sickness, shall be without pay."

Hereafter, the following regulations will be observed in relation to leaves of absence :

1st. Leaves of absence will be granted for thirty days only in the calendar year.

2d. Applications for leave will be addressed to the Secretary and forwarded through, and be approved by, the head of the bureau or chief of the division of the Secretary's Office in which the applicant is employed.

3d. The application will be for the number of days only for which leave is desired at the time, and will state the date on which it is to commence, and every day from the commencement to the expiration of the leave will be reckoned.

4th. Whenever a leave shall have been granted, the period covered by it will be charged against the clerk or employé, whether taken or not.

5th. In case of absence by reason of sickness, the clerk or employé will present his personal certificate, upon honor, stating the fact of such sickness, giving the precise date or dates thereof, and certifying that for such period he was unable, by reason of such sickness, to perform the duties of his position in the Department. Such certificate will also state whether a physician was employed, and, if so, his name and address will be given, and his certificate, giving the dates of his attendance, must accompany the personal certificate herein required. If no physician was in attendance, the personal certificate must be approved by an officer under whom the party is employed.

6th. The certificates provided for in the 5th paragraph must be submitted through the office in which the clerk or employé is employed, and must accompany the semi-monthly time report for the period in which the absence occurred; otherwise they will not be considered in making payments for that period.

7th. In cases in which it shall appear that the sickness alleged is caused by the excessive use of intoxicating liquor or is the result of other improper conduct, the absence caused thereby will be considered as without leave, and will subject the party to dismissal.

8th. No evidence of sickness will be received for any portion of the period covered by a leave of absence; nor will any allowance be made for other than personal sickness of the clerk or employé.

9th. No leave of absence will be granted to any clerk or employé whose aggregate absence from the Department, from any cause, within the year shall have exceeded forty five days.

10th. Heads of Bureaus and Chiefs of Divisions will see that these regulations, so far as they relate to applications for leave and to furnishing evidence of sickness, are strictly complied with.

H. McCULLOCH,
Secretary.

FARRAR'S CASE, *ante* 447.

In this case on page 463, *ante*, it is stated that, "The bill, which finally became said act of July 7, 1884 (23 Stat.; 254), passed the House June 17th, was referred to the Senate Committee on Appropriations June 18th, and reported by Mr. Hale to the Senate June 27th, with a recommendation as to section 2 to "*omit the parts struck through and insert the parts printed in italics,*" as follows:

Then follows said section 2 *without indicating* "the parts struck through." To correct this, said section is now inserted as reported by Mr. Hale to the Senate, the "parts struck through" being included in *brackets*, the parts to be inserted, in *italics*, as in the original, and the residue not in brackets, and not in italics, as in the original as follows:

SEC. 2. ~~{That the several accounting officers of the Treasury Department shall not receive, examine, and consider any claim against the United States unless it shall have been filed within one year from the passage of this act, or within five years after it shall have accrued, nor unless it shall have arisen under an obligation or liability of the United States incurred by authority of law, or~~

~~under some appropriation originally applicable to the payment thereof, and the balance of which appropriation shall have been carried to the surplus fund; and any claim not filed within one of the periods above named shall be forever barred, except as hereinafterward provided. If a person entitled to make a claim against the United States is at the time when it accrues or is matured an infant, or non compos mentis, or a married woman, or imprisoned on a criminal charge, or in execution upon conviction of a criminal offense for a term less than life, the time of such disability is not a part of the time herein limited for the filing of such claim, except that the time so limited cannot be extended more than five years by any such disability, except infancy, or in any case more than one year after the disability ceases. Nothing herein contained shall be held or construed to apply to a claim arising under the public debt of the United States; nor shall anything be held or construed to apply to a claim arising under on a criminal charge or in execution upon conviction of which has already been disposed of by rejection or otherwise or which is already barred by any statute. And]~~
That the Secretary of the Treasury shall, at the commencement of each session of Congress, report the amount due each claimant whose claim has been allowed in whole or in part to the Speaker of the House of Representatives *and the presiding officer of the Senate*, who shall lay the same before ~~[the House]~~ *their respective Houses* for consideration. And hereafter all estimates of appropriations and estimates of deficiencies in appropriations intended for the consideration and seeking the action of any of the committees of Congress shall be transmitted to Congress through the Secretary of the Treasury, and in no other manner; and the Secretary shall first cause the same to be properly classified, compiled, *indexed*, and printed, under the supervision of the chief of the division of warrants, estimates, and appropriations of his Department.

—
 BURDETTE'S CASE, *ante* 476.

The principle decided in this case is supported by a congressional construction of the law, as found in the joint resolution of February 27, 1879 (20 Stat., 673).

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* Prepared by Frank E. Anderson, of this office.

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